(26,191)

SUPREME COUR OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 724.

GUY E. BOWERMAN, APPELLANT,

vs.

C. D. HAMNER, AS RECEIVER OF THE FIRST NATIONAL BANK OF SALMON.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

C. D. HAMNER, Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

2 *Fourth Amended Bill of Complaint.*

In the District Court of the United States in and for the District of Idaho, Eastern Division.

In Equity. No. —.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Defendants.

To the Honorable the Judges of the District Court of the United States in and for the District of Idaho:

Frank R. McCormick, of Cincinnati, and a citizen of the State of Ohio, Receiver of the First National Bank of Salmon, a corporation organized and existing under the National Banking Laws of the United States, and doing business at Salmon, in the County of Lemhi, State of Idaho, by the direction of the Honorable Comptroller of the Currency of the United States, and by leave of the Court in that behalf first had and obtained, brings this fourth amended bill for and on behalf of the said corporation, against Harry G. King, Norman I. Andrews, George Buck, Guy E. Bowerman and E. S. Edwards, citizens of the State of Idaho, and Fred G. Havemann, a citizen of the State of Oregon, and John Lottridge, a citizen of the State of California.

And thereupon your orator complains and says:

3 I.

That the First National Bank of Salmon is a National Banking corporation, duly organized and existing under the laws of the United States, and as such has at all times since on or about the 13th day of January, 1906, been doing a general banking business at Salmon, in the County of Lemhi, State of Idaho, until on or about the 8th day of June, 1911, when the said bank voluntarily suspended business, and that thereafter, on or about the 8th day of August, 1911, the Honorable Comptroller of the Currency of the United States determined the said bank to be in an insolvent condition, and placed one Harry Yeager, temporarily, in charge thereof as Receiver; and that afterwards, on or about the 11th day of September, 1911, the Honorable Comptroller of the Currency appointed the said Frank R. McCormick as the Receiver for the said bank for the purpose of winding up its affairs, who thereupon duly qualified as such Receiver, and entered upon the discharge of his duties as such, and that the said Frank R. McCormick is now the duly appointed, qualified and acting Receiver for the said First National Bank of Salmon, for such purpose, having full charge of all of the assets and business affairs thereof, under the direction of the Honorable Comptroller of the Currency of the United States.

II.

That the said First National Bank of Salmon was originally organized with a capital stock of twenty-five thousand dollars,
4 divided into 250 shares, of the par value of One Hundred Dollars each, and that afterwards, on or about the 5th day of February, 1910, the said capital stock was increased to the amount of Fifty Thousand Dollars, divided into 500 shares, of the par or face value of One Hundred Dollars each; that in the course of its business transactions, the directors of the said bank created a surplus fund on the books of the said bank, of the sum of Fifteen Thousand Dollars, at the following times:

One thousand dollars on the 7th day of January, 1908.

Four thousand dollars on the 5th day of January, 1909.

Five thousand dollars on or about the 5th day of February, 1909, and five thousand dollars on or about the 9th day of July, 1910.

III.

That for the purpose of enabling the said bank to pay its debts and obligations, the Honorable Comptroller of the Currency, on or about the 11th day of January, 1912, levied an assessment and requisition upon the shareholders of the said First National Bank of Salmon, to the full face or par value of the shares of stock of the said bank, held by each of the said shareholders respectively, and amounting in all to the sum of Fifty Thousand Dollars, of which amount there has been paid into the hands of the said Receiver, the

sum of about Twenty Thousand Dollars, and that owing to the insolvency of a number of the said shareholders, the said Re-
5 ceiver will be unable to collect approximately the sum of Twenty Thousand Dollars of such assessment, and that, after realizing upon all of the assets of the said bank now available, and applying the same to the debts and obligations thereof, the same will be insufficient to pay all of the debts and obligations thereof, and that a deficiency of approximately the sum of Twenty Thousand Dollars of unpaid obligations will remain.

IV.

That the defendants Harry G. King, Norman I. Andrews and Guy E. Bowerman were duly elected and qualified, and thereupon became duly acting members of the Board of Directors of the said Bank, at the time of its organization, and continued to act as such until the same was placed in the hands of a Receiver; that the said Harry G. King was at all such times the President of the said Bank, except during the year 1908, when he was the Cashier thereof, having the general management thereof; and that the said Norman I. Andrews was the Vice President thereof, from and after the 10th day of January, 1908; that the defendants, George Buck and John Lottridge, were duly elected and qualified and became acting members of the Board of Directors of the said Bank, from and after the 17th day of November, 1909, and continued as such until the failure thereof; that the said John Lottridge was the duly appointed and acting Cashier of the said Bank from and after January 1st, 1910, until June 8, 1911; that the defendant, Frank G. Havemann, was a duly elected, qualified and acting member of the said Board of
6 Directors from January 18, 1910, until the failure of the said bank, being the assistant cashier during said period; that the defendant, H. S. Edwards, was a duly elected, qualified and acting member of said Board of Directors from May 15, 1906, until January 18, 1910.

V.

That the defendants herein, Harry G. King, Norman I. Andrews, Guy E. Bowerman, Fred G. Havemann, George Buck and John Lottridge, and each of them, during the term of service of each of said defendants as director as aforesaid, knowingly permitted and assented to the making of loans by the officers, agents and servants of the said First National Bank of Salmon far in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby large sums of money belonging to the stock holders and depositors of said bank became wasted and lost. That the respective amounts of said loans, the dates thereof, the persons to whom the same were made, are as follows, to-wit:

(*a*) On or about the 15th day of February, 1910, the Salmon Lumber Company, a corporation, the shares of which were owned principally by members of the family of said H. G. King, was owing the said First National Bank, on account of an overdraft, the sum

of $1,597.92; and on the first day of July, 1910, the said Salmon Lumber Company was indebted to the said First National Bank upon a promissory note theretofore executed, in the sum of $3,500.00;
7 that on said last-named date, there was loaned to said Salmon Lumber Company by said bank, the further sum of $2,500.00; that thereafter, to-wit, on or about the 2nd day of November, 1910, there was loaned by said First National Bank to the said Salmon Lumber Company, the further sum of $3,500.00; that on the 10th day of December, 1910, there was loaned to the said Salmon Lumber Company, by said First National Bank, the further sum of $6,000.00, and on or about the 4th day of January, 1911, the further sum of $3,000.00.

(*b*) That on or about the 11th day of July, 1910, there was loaned by the said bank to E. M. Pollard and S. A. Pollard, husband and wife, of Salmon City, Lemhi County, Idaho, the sum of $7,950.00 as evidenced by two promissory notes of that date, one for $1,700.00 and the other $6,250.00.

(*c*) That for some time immediately prior to January 2, 1911, one Harry Brown was permitted and allowed to overdraw at said bank in various large amounts, to cover which said overdrafts said Brown, from time to time, executed his promissory notes; that on said date there was owing by said Brown, on such notes and on the overdraft existing on said date, the total sum of $12,750.00, for which said Brown, on said date, executed and delivered his two certain promissory notes for $6,250.00 and $6,500.00, respectively.

VI.

That the said loans so made as aforesaid to the Salmon Lumber Company, F. M. Pollard and S. A. Pollard and Harry Brown
8 were each and all in excess of one-tenth part of the capital stock of the said bank actually paid in and were each and all in violation of Section 5200 of the Revised Statutes of the United States; that at the time said loans were made, as aforesaid, the said defendant Harry G. King was the duly elected and acting President of said bank, the said defendant Norman I. Andrews the duly elected and acting Vice President, and the said defendant John Lottridge the duly elected Cashier thereof, and with the said defendants Guy F. Bowerman, George Buck and Fred G. Havemann constituting the Board of Directors of said bank. That at the meeting of the Board of Directors held on the 18th day of January, 1910, Section 34 of the by-laws of said bank was by resolution duly passed, amended to read as follows:

"The Board of Directors of the bank shall at each monthly meeting or oftener examine and approve all loans and discounts and such approval shall be recorded in a book kept for that purpose." And plaintiff alleges that at each and all of the regular meetings of the said Board of Directors which were held monthly between the said 18th day of January, 1910, and the 1st day of March, 1911, between which said dates the said excessive loans were made as aforesaid, each and all of said defendants Harry

G. King, Norman I. Andrews, George Buck, Fred G. Havemann and John Lottridge attended the said meetings of the said Board of Directors and each month personally passed upon and knowingly approved each monthly statement of loans which during the month covered by each of said statements had been made by said bank through the said Harry G. King, President; Norman I. Andrews, Vice-President, and John Lottridge, Cashier, who during said period were charged with the management and conduct of its affairs, and plaintiff is informed and believes and upon information and belief alleges that as to the said excessive loans so made to said Salmon Lumber Company, as aforesaid, the said defendant- Norman I. Andrews, George Buck and Fred G. Havemann well knew at the time said loans were made of the interest held, owned and possessed by said defendant King and the members of his family in the said Salmon Lumber Company, and that said defendants, and each of them, well knew at the time said loans were made that the said Salmon Lumber Company was doing business with said First Naticnal Bank, and that the said defendants Harry G. King and John Lottridge were making the said excessive loans to said Salmon Lumber Company, and carelessly, negligently, wilfully and knowingly permitted and allowed the said King and Lottridge to make said illegal loans whereby the funds of said bank became lost as hereinafter alleged; that as to the said loans so made, as aforesaid, to the said F. M. Pollard and S. A. Pollard and to the said Harry Brown, plaintiff alleges that the same were made for said bank by said Harry G. King and said John Lottridge, then President and Cashier respectively of said bank, and that the said defendants Norman I. Andrews, George Buck and Fred G. Havemann well knew that said excessive loans were being made, and carelessly, negligently, knowingly and wilfully permitted and allowed the same to be made, whereby the funds of said bank became lost as hereinafter alleged.

VII.

Plaintiff further alleges that the said defendant Guy E. Bowerman, notwithstanding the fact that he was from the time of the organization of said bank on the 13th day of January, 1906, until the 8th day of June, 1911, when the said bank suspended business, a duly elected, qualified and acting member of the Board of Directors of said bank, and notwithstanding his oath as such director that he would diligently and honestly manage the affairs of said bank and would not willingly permit to be violated any of the provisions of the law relating to the conduct thereof, carelessly, wilfully and negligently failed and neglected to attend any meeting of the Board of Directors of said bank during the entire period of his incumbency as a director, and wilfully, carelessly and negligently failed during said entire period to discharge his duties and obligations as a member of the Board of Directors of said bank in examining into and keeping well informed concerning its affairs and particularly the loans which were being made by said bank and wilfully, carelessly and negligently

during said period failed to exercise proper or any supervisory authority as such director over said bank's affairs, but to the contrary the said Guy E. Bowerman, during the period when the affairs of said bank were being grossly mismanaged and particularly during the period when the said excessive loans were made, as aforesaid, with knowledge from the published statements of said bank required to be furnished by the Comptroller of the Currency and from other sources, that the affairs of said bank were being grossly mismanaged and that excessive and illegal loans were being made, carelessly, negligently and wilfully permitted and allowed the said King and Lottridge to make such loans and particularly the loans to the said Salmon Lumber Company, F. M. Pollard, S. A. Pollard and Harry Brown, as hereinbefore set forth, whereby the funds of said bank became lost as hereinafter set forth.

VIII.

Plaintiff alleges that the said Salmon Lumber Company, during the time said excessive loans were being made to it, became insolvent and was thereafter compelled to suspend business with assets insufficient to satisfy and discharge its liabilities, and that no part of the monies so loaned by said bank to said lumber company have ever been repaid to said bank, except the sum of $2,360.00, paid on the — day of ——, 19—, which was credited on the said loan of July 27, 1910, and the further sum of $1,500.00, which has been paid to this plaintiff by the trustee of said Salmon Lumber Company, and a loss will result to said First National Bank on account of said loans of approximately $10,000.00.

That no part of the said $7,950.00 loaned to the said F. M. Pollard and S. A. Pollard was ever repaid by them to said bank, and that although judgment has been recovered on said notes so executed by said Pollards the same remains unsatisfied except for a credit of $150.00 for a lot purchased by this plaintiff for his said trust upon execution and order of sale under said judgment, and plaintiff alleges that the balance of the money so loaned to said Pollards will be lost to said bank.

That the said Harry Brown is insolvent and although he has turned over to this plaintiff all his available assets, not more than approximately $2,000.00 will be realized therefrom and the balance of said excessive loans so made to him as aforesaid will be lost to said bank.

IX.

This plaintiff further alleges that said bank did a large and profitable business after its organization until the close of the year 1909, and the affairs thereof were in a fairly prosperous condition until the beginning of that year when the then Board of Directors, among whom were the defendants Marry G. King, Norman I. Andrews, E. S. Edwards, and Guy E. Bowerman entered upon a careless and negligent management of the affairs of said bank, and *on* or about

the month of March, 1909, said Board of Directors without protest from and with the knowledge of said Harry G. King, Norman I. Andrews, E. S. Edwards and Guy E. Bowerman negligently and carelessly and without due or any regard to the rights of the stockholders of said First National Bank of Salmon purchased all the assets of a rival bank in said town of Salmon, the bank of Langsdorf
13 & Company, paying therefor the sum of $14,500.00 over and above the par or face value of the assets thereof, and also $14,500.00 over and above the true value of the assets of said bank, all of which was at the time of said purchase well known to the said defendants Harry G. King, Norman I. Andrews, E. S. Edwards and Guy E. Bowerman, or should have been known to said named defendants if they had used proper or any care or diligence in determining the value of said assets at the time of said purchase, and by reason of the negligence and carelessness of said defendants in not ascertaining the true value of said assets, and in paying therefor out of the funds of said First National Bank of Salmon the sum of $14,500.00 in excess of the true value thereof, the money of the stockholders of said First National Bank of Salmon became thereby lost and negligently wasted to approximately the sum of $14,500.00.

X.

Plaintiff further alleges that the said defendants Harry G. King, Norman I. Andrews, George Buck, Guy E. Bowerman, Fred G. Havemann and John Lottridge during their respective terms of office as hereinbefore set forth, wilfully, carelessly and negligently failed to properly manage and conduct the affairs of said bank and wilfully and carelessly allowed the same to be grossly mismanaged whereby the assets thereof were wasted and lost; that between the 1st day of January, 1910, until the failure of said bank on the 8th day
14 of June, 1911, the said defendants Harry G. King as President, and John Lottridge as Cashier, who, subject to the authority of the said Board of Directors, were operating said bank and conducting its affairs, wilfully, carelessly and negligently loaned the funds of said bank to various persons and companies upon insufficient or no security and to various other persons and companies not having sufficient assets with which to repay the same whereby large sums of money belonging to stockholders and depositors of said bank became lost and wasted; that said defendants King and Lottridge as President and Cashier respectively, of said bank during the time aforesaid, carelessly, negligently and wilfully made large loans of the funds of said bank to officers thereof and to companies in which some of said officers were interested, which said loans so made were far in excess of any amount justified by the financial standing of the persons and companies to whom said loans were made and carelessly and negligently and wilfully and in direct violation of the by-laws of said bank permitted the money and funds of said bank to be paid out upon checks and orders of various persons and companies that did not have sufficient or any funds on deposit therein with which to pay such checks and orders whereby large sums of money

of said stockholders and depositors became wasted and lost. That by way of particularity as to certain of the numerous acts of gross mismanagement hereinbefore referred to plaintiff alleges:

(*a*) That on the 11th day of July, 1910, there was loaned by said bank to F. M. Pollard and S. A. Pollard, husband and
15 wife, of Salmon City, Lemhi County, Idaho, the sum of $7950.00 as evidenced by two notes of that date payable to said bank, one for $1700.00 and the other for $6250.00, which money has never been repaid by said Pollards or either of them; that at the time said loans were made the financial standing of said Pollards would not justify the making of said loans, or either of them, and said loans were wilfully, carelessly and negligently made without sufficient or any security, and plaintiff alleges that although judgment has been recovered upon said notes, upon execution and order of sale thereunder, only $150.00 has been or can be realized to apply upon said judgment, which said amount is the value of one lot purchased by this plaintiff for his said trust, and the balance of the money so loaned is, according to information and belief of this plaintiff, a total loss. Plaintiff alleges that the said loan is the same loan mentioned in paragraph V hereof as being in excess of the amount allowed to be loaned under the provisions of Section 5200 of the Revised Statutes of the United States.

(*b*) That on or about the 15th day of February, 1910, the Salmon Lumber Company, a corporation, the shares of which were owned principally by members of the family of said H. G. King, was owing the said First National Bank, on account of an overdraft, the sum of $1597.92, and on the first day of July, 1910, the said Salmon Lumber Company was indebted to the said First National Bank upon a promissory note theretofore executed, in the
16 sum of $3500.00; that on said last-named date, there was loaned to said Salmon Lumber Company by said bank the further sum of $2500.00; that thereafter, to-wit, on or about the 2nd day of November, 1910, there was loaned by said First National Bank to the said Salmon Lumber Company, the further sum of $3500.00; that on the 10th day of December, 1910, there was loaned to the said Salmon Lumber Company by said First National Bank, the further sum of $6000.00, and on or about the 4th day of January, 1911, the further sum of $3000.00; that all of said obligations of said Salmon Lumber Company remain unpaid except the sum of $2360.80, which was credited on the said loan of July 27, 1910, and the further sum of $1500.00, which has been paid to this plaintiff by the trustee of the Salmon Lumber Company. That at the time said loans were made the financial standing of said Lumber Company would not justify the making of said loans or any of them, and that the same were wilfully, carelessly and negligently made without sufficient or any security, and that said Salmon Lumber Company became insolvent during the period when said loans were being made to it, and was afterwards compelled to suspend business, leaving assets insufficient to settle its liabilities, and plaintiff alleges that there will be a loss to said bank on account of said loans of approximately $10,000.00. Plaintiff alleges that said loans are

the same loans mentioned in paragraph V hereof and there alleged to have been in excess of the amount allowed to be loaned
17 under the provisions of the Section 5200, Revised Statutes of the United States.

(c) That for some time immediately prior to January 2, 1911, one Harry Brown was permitted and allowed to overdraw at said bank in various large amounts to cover which said overdraft said Brown, from time to time, executed his promissory notes; that on said date there was owing by said Brown on such notes and on the overdraft existing on said date, the total sum of $12,750.00, for which said Brown on said date executed and delivered his two certain promissory notes for $6250.00 and $6500.00 respectively; that at the times said overdrafts were allowed and said loans made as aforesaid, the financial standing and credit of the said Harry Brown would not justify the making of said loans, or any of them, and that the same were wilfully, carelessly and negligently made, without sufficient or any security; that the said Harry Brown is insolvent and although he has turned over to this plaintiff all his available assets there will not be realized therefrom more than the sum of $2000.00, and the balance of the loans so made to Harry Brown will result in a total loss to said bank. Said loans are the same loans mentioned in paragraph V hereof and therein alleged to be in viclation of Section 5200, Revised Statutes of the United States.

XI.

Plaintiff further alleges that at the times when said loans were made as set forth in paragraph V hereof, the said defendants Norman I. Andrews, George Buck and Fred G. Havemann well
18 knew of the making of said loans and of the financial standing and responsibility of the persons and companies to whom the same were made and plaintiff further alleges that said defendants and each of them without regard to their oath as directors of said bank that they would diligently and honestly manage the affairs thereof, and would not willingly permit to be violated any of the provisions of law relating to the conduct thereof and without exercising proper or any supervisory authority over said bank's affairs, wilfully, carelessly and negligently permitted and allowed said loans to be made and at the monthly meetings of the Board of Directors of said bank held during the period within which said loans were made, passed upon, approved and ratified said loans so carelessly and negligently made as aforesaid by the said Harry G. King, President, and the said John Lottridge, Cashier of said bank. And plaintiff further alleges that the said defendant Guy E. Bowerman, notwithstanding he was duly elected, qualified and acting director of said bank from the organization thereof on the 13th day of January, 1906, until the failure of said bank on the 8th day of June, 1911, wilfully, carelessly and negligently failed and neglected to attend any of the meetings of the Board of Directors of said bank and negligently, carelessly and wilfully failed

during the time when such wrongful acts were committed to examine the books and records of said bank to ascertain said bank's condition, and to ascertain the amount of overdrafts and
19 loans allowed and made to various patrons of said bank, and wilfully, carelessly and negligently failed during the long period when such mismanagement was going on to exercise as such director proper or any supervisory authority over said bank's affairs, whereby said loss might and could have been prevented and avoided, but to the contrary and with knowledge that the affairs of said bank were being grossly mismanaged and with knowledge that excessive and illegal loans were being made to various persons and companies without regard to his oath as such director that he would diligently and honestly manage the affairs of said bank, and would not willingly permit to be violated any provisions of law relating to the conduct thereof, carelessly, negligently and wilfully permitted and allowed said King and Lottridge to make said excessive and illegal loans as hereinbefore set forth, whereby the funds belonging to the stockholders and depositors of said bank became lost and wasted as aforesaid.

dividend

XII.

That on the 9th day of July, 1910, owing to the careless and negligent conduct and wrongful and illegal acts as hereinbefore set forth of the defendants during their terms of office respectively, the capital and surplus of said bank had become much impaired and the value of the assets thereof greatly depreciated, but notwithstanding such fact the said defendants Harry G. King, Norman I. Andrews, George Buck, Fred G. Havemann and John Lottridge
20 at said time wrongfully, knowingly and wilfully assented to the declaring of a dividend out of the available assets of said bank of the sum of $2500.00, and paid the same to the stockholders thereof including their proportionate share to each of said defendants, and the said defendants further in violation of law knowingly and carelessly and negligently permitted and assented to the carrying of the sum of $5000.00 to the surplus account of said bank, thus showing on the said books the right to make loans in excess of the amount which could have been legally loaned had the books shown the true condition of the affairs of said bank. Plaintiff alleges that although the said defendant Guy E. Bowerman was not present at the meeting of the Board of Directors at which the said dividend was declared and the said $5000.00 carried to the surplus account of said bank, he, the said Guy E. Bowerman, wilfully and knowingly accepted his proportion of said dividend, and with knowledge that the said bank was being mismanaged, and that large and excessive loans were being made, in violation of his oath as such director, and without exercising proper or any supervisory control over the affairs of said bank, which as director he was duty bound to do, he, the said Guy E. Bowerman, wilfully, carelessly and negligently permitted the said dividend to be declared and the said $5000.00 to be carried to the surplus account of said bank as hereinbefore alleged.

XIII.

That at the time of the closing of said bank the said defendants during their respective terms of office, as aforesaid, in viola-
21 tion of the by-laws of said bank, and in violation of their duties as directors of said banking association, had carelessly and negligently by failing to supervise the affairs of said bank, permitted to be paid checks and orders drawn on said bank of persons and companies not having any funds on deposit therein with which to pay the same to the extent of $9,800; and that many of the persons who made such overdrafts were insolvent, and have been and now are unable to repay the money so drawn out, and as a result thereof a large amount of the money so paid out will be lost to the said bank. That the names of the persons and companies having no funds in said bank and upon whose orders and checks payments of money were made, together with a statement of condition of the respective accounts of said persons at the dates when such payments were made are fully set forth in plaintiff's Exhibit "A," attached to the original bill of complaint on file herein and hereby referred to, and made a part hereof, and plaintiff alleges that no payments have been made by said persons or companies to said bank or to this plaintiff as receiver except as appears in the said "Exhibit A"; that if said defendants had performed their duties as directors and supervised the affairs of said bank, they would have known that said overdrafts were being permitted and would have stopped the same, and said losses would not have occurred.

22 XIV.

That the losses which will result to the said bank on account of the said excess loans, will reach the probable amount of Twenty-five to Thirty Thousand Dollars; and that the losses which will result thereto from the said overdrafts will reach the probable amount of Four Thousand Dollars or more; and that the losses which will result thereto from the declaration of the said illegal dividend will reach the amount of two Thousand Five Hundred Dollars; and that all such losses are directly caused by the careless and negligent handling of the funds, the mismanagement of the affairs of the said bank, and the wilful neglect of said defendants as directors of said institution as hereinbefore particularly set forth.

XV.

That your orator has not any plain, adequate and complete remedy at law.

Wherefore, your orator prays that your Honorable Court may take an accounting of the affairs of the said First National Bank of Salmon, and of the actions and conduct of its said Board of Directors in connection with the matters and things hereinbefore recited, and

determine the liability of the respective defendants therefor; that, after having determined such liability, a judgment may be entered against the said defendants respectively, according to such respective liability, *require* them, the said defendants, to return the money so carelessly and negligently wasted and lost, and so illegally
23 received by them, and for such other general relief as may to your honorable Court be deemed just and equitable.

F. J. COWEN,
Residing at Salmon, Idaho;
D. WORTH CLARK,
JESSE R. S. BUDGE,
Residing at Pocatello, Idaho,
Counsel for Complainant.

STATE OF NEBRASKA,
County of Clay, ss:

Frank R. McCormick, being first duly sworn, deposes and says: That he is the plaintiff in the foregoing action; that he has read the foregoing bill and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be upon information or belief and as to those matters he believes it to be true.

FRANK R. McCORMICK.

Subscribed and sworn to before me this 21st day of March, 1914.
[SEAL.]
——— ———,
Notary Public.

My commission expires November 25, 1919.

EXHIBIT "A."

George W. Barfield.

	Checks.	Balance.	Overdraft.
March 15, 1911.....	.....	$306.50	.....
March 22, 1911.....	$301.00	.....	.....
March 22, 1911.....	15.00	316.00	$9.50
March 27, 1911.....	5.00	5.00	14.50

24 Fred Brough.

	Checks.	Balance.	Overdraft.
May 17, 1911.....	.....	$122.81	.....
June 6, 1911.....	$175.00	$175.00	$52.19

Paid since bank closed, $27.19.

Harry Brown.

	Checks.	Balance.	Overdraft.
Feb. 2, 1911.....	.....	$000.00	.....
March 29, 1911.....	$10.00	.....	$10.00
May 6, 1911.....	110.00	.....	110.00

Paid since bank closed, $99.75.

C. F. Hanmer.

	Checks.	Balance.	Overdraft.
May 27, 1911.....	.....	$21.38	.....
June 2, 1911.....	$100.00	$100.00	$78.62
June 6, 1911.....	25.00	.....	.....
June 6, 1911.....	23.50	48.50	127.12

J. L. Harmon.

Jan. 7, 1911.....	$7.00	.....	$7.00

Henderson & Kent.

	Checks.	Balance.	Overdraft.
June 25, 1910.....	.....	$11.08	.....
July 2, 1910.....	$13.71	.....	$2.63
July 28, 1910.....	9.95	43.66	12.58

Idaho Coal & Land Company.

	Checks.	Balance.	Overdraft.
June 23, 1910.....	.....	$8.52	.....
June 30, 1910.....	$11.25	.....	$2.73
July 26, 1910.....	10.85	.....	13.58
25			
Aug. 3, 1910.....	5.15	.....	18.73
Nov. 3, 1910.....	195.36	.....	214.09
Dec. 5, 1910.....	31.50	.....	245.59
Dec. 29, 1910.....	4.25	.....	249.84
March 23, 1911.....	1.50	.....	251.34
April 29, 1911.....	10.00	.....	261.34

L. L. Kent.

	Checks.	Balance.	Overdraft.
May 21, 1910.....	.....	$28.19	.....
May 23, 1910.....	$65.65	.....	$37.46

H. G. King.

		Checks.	Deposits.	Balance.	O'draft.
Nov.	2, 1910.....	.....	.....	$124.78	.....
Nov.	4, 1910.....	$350.00	.....	.....	$225.22
Nov.	12, 1910.....	500.00	.....	.....	725.22
Nov.	14, 1910.....	47.15	.....	.....	772.37
Nov.	17, 1910.....	3.24	.....	.....	775.61
Nov.	18, 1910.....	24.00	.....	.....	799.61
Nov.	22, 1910.....	15.55	.....	.....	815.16
Nov.	23, 1910.....	6.00	.....	.....	821.16
Nov.	28, 1910.....	.....	200.00	.....	621.16
Nov.	29, 1910.....	24.50	.....	.....	645.66
Dec.	5, 1910.....	622.25	320.00	.....	947.66
		.....	15.00	.....	932.66
Dec.	6, 1910.....	15.00	.....	.....	947.66
Dec.	7, 1910.....	3.50	.....	.....	951.16
Dec.	8, 1910.....	352.00	.....	.....	1,303.16
Dec.	12, 1910.....	.....	34.85	.....	1,268.31
Dec.	17, 1910.....	3.40	.....	.....	1,271.71
26					
Dec.	21, 1910.....	12.75	.....	.....	1,284.46
Dec.	23, 1910.....	3.00	.....	.....	1,287.46
Dec.	27, 1910.....	8.50	.....	.....	1,295.96
Dec.	28, 1910.....	.....	200.00	.....	1,095.96
Dec.	29, 1910.....	10.00	.....	.....	1,105.96
		10.00	.....	.....	1,115.96
Dec.	30, 1910.....	35.00	.....	.....	1,150.96
Jan.	3, 1911.....	36.00	.....	.....	1,186.96
Jan.	4, 1911.....	24.50	.....	.....	1,211.46
Jan.	5, 1911.....	11.25	.....	.....	1,222.71
Jan.	7, 1911.....	3.00	.....	.....	1,225.71
Jan.	9, 1911.....	2.00	.....	.....	1,227.71
Jan.	10, 1911.....	88.15	.....	.....	1,315.86
Jan.	11, 1911.....	2.25	.....	.....	1,318.11
Jan.	14, 1911.....	9.18	.....	.....	1,327.29
Jan.	16, 1911.....	9.20	.....	.....	1,336.49
Jan.	23, 1911.....	.....	50.00	.....	1,286.49
Jan.	26, 1911.....	24.50	.....	.....	1,310.99
Jan.	28, 1911.....	11.00	.....	.....	1,321.99
Jan.	31, 1911.....	.....	225.00	.....	1,096.99
Feb.	2, 1911.....	30.00	.....	.....	1,126.99
Feb.	6, 1911.....	5.75	.....	.....	1,132.74
Feb.	7, 1911.....	.....	47.80	.....	1,084.94
Feb.	10, 1911.....	10.00	.....	.....	1,094.94
Feb.	11, 1911.....	3.50	.....	.....	1,098.44
Feb.	13, 1911.....	208.75	.....	.....	1,307.19
Feb.	16, 1911.....	17.00	.....	.....	1,324.19

		Checks.	Deposits.	Balance.	O'draft.
Feb.	17, 1911.....	.....	203.94	.....	1,120.25
Feb.	18, 1911.....	464.85	.....	.....	1,585.10
Feb.	20, 1911.....	3.50	.....	.....	1,588.60
27					
Feb.	21, 1911.....	22.25	.....	.....	1,610.85
Feb.	23, 1911.....	208.00	.....	.....	1,818.85
Feb.	25, 1911.....	3.50	.....	.....	1,822.35
Feb.	27, 1911.....	.....	225.00	.....	1,597.35
Feb.	28, 1911.....	34.25	.....	.....	1,631.60
March	3, 1911.....	2.25	.....	.....	1,633.85
March	4, 1911.....	76.00	.....	.....	1,709.85
March	6, 1911.....	19.00	.....	.....	1,728.85
March	14, 1911.....	50.00	15.00	.....	1,763.85
March	15, 1911.....	15.00	.....	.....	1,778.85
March	17, 1911.....	50.00	.....	.....	1,828.85
March	18, 1911.....	.60	.....	.....	1,829.45
March	20, 1911.....	2.25	.....	.....	1,831.70
March	23, 1911.....	51.00	.....	.....	1,882.70
March	27, 1911.....	32.60	.....	.....	1,915.30
March	31, 1911.....	450.05	225.00	.....	2,140.35
March	31, 1911.....	.....	1,000.00	.....	1,140.35
April	4, 1911.....	5.00	.....	.....	1,145.35
April	5, 1911.....	2.00	.....	.....	1,147.35
April	10, 1911.....	.....	25.00	.....	1,122.35
April	13, 1911.....	53.00	.....	.....	1,175.35
April	15, 1911.....	2.25	.....	.....	1,177.60
April	17, 1911.....	3.00	.....	.....	1,180.60
April	19, 1911.....	2.10	.....	.....	1,182.70
April	20, 1911.....	36.50	.....	.....	1,219.20
April	21, 1911.....	25.70	.....	.....	1,244.90
April	22, 1911.....	15.00	.....	.....	1,259.90
April	25, 1911.....	1.00	.....	.....	1,260.90
April	29, 1911.....	170.65	225.00	.....	1,206.55
May	1, 1911.....	17.85	.....	.....	1,224.40
28					
May	3, 1911.....	10.00	.....	.....	1,234.40
May	4, 1911.....	25.00	250.00	.....	1,009.40
May	5, 1911.....	1.00	.....	.....	1,010.40
May	6, 1911.....	6.50	.....	.....	1,016.90
May	9, 1911.....	.....	500.00	.....	.....
		.....	100.00	.....	416.90
May	10, 1911.....	255.00	.....	.....	671.90
May	13, 1911.....	5.00	.....	.....	676.90
May	15, 1911.....	.....	400.00	.....	276.90
May	17, 1911.....	100.00	.....	.....	376.90
May	18, 1911.....	170.57	.....	.....	547.47

	Checks.	Deposits.	Balance.	O'draft.
May 19, 1911.....	25.00	.....	.....	572.47
May 31, 1911.....	12.00	225.00	.....	359.47
June 2, 1911.....	4.00	.....	.....	363.47
June 5, 1911.....	225.45	.....	.....	588.92

Geo. Leabo.

	Checks.	Deposits.	Balance.	O'draft.
Nov. 3, 1910.....	.....	.....	.....	.....
Nov. 28, 1910.....	521.00	.....	.....	521.00
Feb. 2, 1911.....	.....	487.20	.....	33.80

John Lottridge.

	Checks.	Deposits.	Balance.	O'draft.
June 2, 1911.....	.....	.....	$41.99	.....
June 2, 1911.....	$150.00	.....	.....	$108.01
June 5, 1911.....	5.00	.....	.....	113.01
June 7, 1911.....	451.39	.....	.....	564.40

Paid, 10-4-11, $110.78; 1-9-13, $74.50.

29 Allen C. Merritt.

	Checks.	Deposits.	Balance.	O'draft.
March 18, 1910.....	.....	.....	$7.22	.....
March 22, 1910.....	$12.50	.....	.....	$5.28
March 25, 1910.....	750.00	.....	.....	755.28
March 28, 1910.....	21.00	.....	.....	776.28
April 5. 1910.....	10.00	$140.00	.....	646.28
April 6, 1910.....	100.00	.....	.....	746.28
April 9, 1910.....	20.50	.....	.....	766.78
April 21, 1910.....	12.50	.....	.....	779.28
April 30, 1910.....	1.00	.....	.....	780.28
May 2, 1910.....	.....	60.00	.....	720.28
May 4, 1910.....	30.00	.....	.....	750.28
May 7, 1910.....	10.00	.....	.....	760.28
May 9, 1910.....	27.00	.....	.....	787.28
May 11, 1910.....	10.00	.....	.....	797.28
May 21, 1910.....	12.50	.....	.....	809.78
June 22, 1910.....	12.50	.....	.....	822.28
June 30, 1910.....	36.45	.....	.....	858.73
July 26, 1910.....	12.50	.....	.....	871.23
August 22, 1910.....	12.50	.....	.....	883.73
Sept. 21, 1910.....	12.50	.....	.....	896.23
Oct. 22, 1910.....	12.50	.....	.....	908.73
Nov. 29, 1910.....	12.50	.....	.....	921.23
Dec. 29, 1910.....	41.00	.....	.....	962.23
Jan. 4, 1911.....	12.50	.....	.....	974.23

	Checks.	Deposits.	Balance.	O'draft.
Jan. 26, 1911.....	12.50	.....	.....	987.23
Feb. 23, 1911.....	12.50	.....	.....	999.23
March 23, 1911.....	12.50	.....	.....	1,012.23
April 21, 1911.....	12.50	25.98	.....	998.75

Paid since closing, 9-28-11, $124.25.

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E. E. Minert.

	Checks.	Deposits.	Balance.	O'draft.
May 8, 1911.....	.....	.....	$4.55	.....
May 8, 1911.....	$7.00	.....	.....	$2.45

K. H. Morse.

	Checks.	Deposits.	Balance.	O'draft.
May 6, 1911.....	.....	.....	$24.35	.....
May 8, 1911.....	$31.75	.....	.....	$7.40
May 9, 1911.....	38.00	.....	40.00	5.40
May 10, 1911.....	38.35	.....	42.35	1.40
May 15, 1911.....	19.00	.....	.....	20.40
May 22, 1911.....	.....	.....	10.00	10.40
May 29, 1911.....	8.90	.....	.....	19.30
June 1, 1911.....	.....	.....	9.00	10.30

Salmon Land & Mines Co.

	Checks.	Deposits.	Balance.	O'draft.
June 2, 1910.....	.....	.....	$6.12	.....
June 4, 1910.....	$69.75	.....	.....	$63.60
Aug. 16, 1910.....	46.75	.....	.....	110.38
Oct. 18, 1910.....	.....	$37.50	.....	72.88
Oct. 24, 1910.....	29.00	.....	.....	101.88
Nov. 17, 1910.....	37.50	.....	.....	139.38
Dec. 29, 1910.....	6.50	.....	.....	145.88

W. W. Schultz.

	Checks.	Deposits.	Balance.	O'draft.
March 15, 1911.....	.....	.....	$6.07	.....
March 31, 1911.....	$451.39	.....	.....	$445.32
April 15, 1911.....	5.00	.....	.....	450.32
April 17, 1911.....	2.00	.....	.....	452.32
April 18, 1911.....	6.50	.....	.....	458.32
June 7, 1911.....	.....	$451.39	.....	7.43

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Bert Simers.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 31, 1911.....	.....	.....	$1.03	.....
Feb. 1, 1911.....	$55.00	.....	.....	$53.97
Feb. 3, 1911.....	3.75	.....	.....	90.72
Feb. 6, 1911.....	32.25	.....	.....	122.97
Feb. 8, 1911.....	1.00	.....	.....	123.97
Feb. 28, 1911.....	1.90	$62.50	.....	63.35
March 1, 1911.....	43.60	.....	.....	106.95
March 2, 1911.....	8.45	.....	.....	115.40
March 6, 1911.....	3.00	.....	.....	118.40
March 7, 1911.....	1.00	.....	.....	119.40
March 14, 1911.....	.....	33.50	.....	85.90
March 15, 1911.....	1.00	.....	.....	86.90
March 16, 1911.....	10.00	.....	.....	96.90
March 17, 1911.....	1.00	.....	.....	97.90
March 22, 1911.....	5.00	.....	.....	102.90
March 24, 1911.....	1.05	.....	.....	103.95
March 27, 1911.....	20.00	.....	.....	123.95
May 1, 1911.....	1.85	.....	.....	125.80

Z. T. Vincent.

	Checks.	Deposits.	Balance.	O'draft.
May 27, 1911.....	.....	.....	$3.49	.....
May 29, 1911.....	$13.88	.....	.....	$10.39
May 31, 1911.....	12.66	.....	.....	23.05
June 1, 1911.....	39.33	.....	.....	52.38
June 3, 1911.....	.....	$10.00	.....	52.38

John R. Wheeler.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 26, 1911.....	.....	.....	$758.29	.....
Feb. 6, 1911.....	$1,274.16	.....	.....	$515.87

32

March 4, 1911.....	150.00	.....	.....	665.87
March 31, 1911.....	51.00	.....	.....	716.87
April 15, 1911.....	.....	$80.00	.....	636.87
April 22, 1911.....	2.00	75.00	.....	563.87
April 25, 1911.....	45.33	.....	.....	609.20
April 26, 1911.....	4.00	.....	.....	613.20
April 27, 1911.....	6.00	.....	.....	619.20
April 29, 1911.....	5.90	.....	.....	625.10
May 1, 1911.....	20.35	.....	.....	645.45
May 2, 1911.....	2.50	.....	.....	647.95
May 6, 1911.....	3.00	.....	.....	650.95

	Checks.	Deposits.	Balance.	O'draft.
May 8, 1911.....	5.00	.....	.....	655.95
May 16, 1911.....	12.00	.....	.....	667.95
May 17, 1911.....	179.36	.....	.....	847.31
	4.65	572.70	.....	279.26
June 13, 1911.....	572.70	.....	.....	851.96

Myra L. Wheeler.

	Checks.	Deposits.	Balance.	O'draft.
May 3, 1911.....	.....	.....	$6.15	.....
May 4, 1911.....	$10.00	.....	.....	$3.85
May 11, 1911.....	7.90	.....	.....	11.75
May 18, 1911.....	2.00	.....	.....	13.75
May 27, 1911.....	4.50	.....	.....	18.25
May 29, 1911.....	1.50	.....	.....	19.75

Jos. G. Wicklund.

	Checks.	Deposits.	Balance.	O'draft.
April 3, 1911.....	.....	.....	$70.61	.....
April 6, 1911.....	$148.49	.....	.....	$77.88
April 11, 1911.....	41.45	.....	.....	119.33
33				
April 17, 1911.....	10.00	.....	.....	129.33
April 29, 1911.....	11.85	.....	.....	141.18

Fred Carl.

	Checks.	Deposits.	Balance.	O'draft.
May 1, 1911.....	.....	.....	$44.15	.....
May 6, 1911.....	$50.65	.....	.....	$6.50
May 8, 1911.....	199.55	.....	.....	206.05
May 22, 1911.....	4.75	.....	.....	210.80
June 3, 1911.....	101.75	.....	.....	312.55
June 5, 1911.....	52.40	.....	.....	364.95

Elizabeth McClung.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 30, 1911.....	.....	.....	$5.58	.....
Feb. 15, 1911.....	$5.90	.....	.....	$.32
April 15, 1911.....	1.50	.....	.....	1.82

W. H. O'Brien.

	Checks.	Deposits.	Balance.	O'draft.
March 8, 1911.....	.....	.....	$1.31	.....
April 7, 1911.....	$5.00	.....	.....	$3.69

F. M. Pollard.

	Checks.	Deposits.	Balance.	O'draft.
Jan. 18, 1911.....	.....	.....	$285.04	.....
Feb. 8, 1911.....	$397.50	.....	.....	$112.46
April 13, 1911.....	.....	$5.00	.....	107.46
April 14, 1911.....	5.00	.....	.....	112.46

$90 paid since bank closed.

Endorsed: Filed March 25, 1914. A. L. Richardson, Clerk.

34 In the District Court of the United States for the District of Idaho, Eastern Division.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Plaintiff,

vs.

HARRY G. KING et al., Defendants.

Answer of Defendant Guy E. Bowerman to the Fourth Amended Bill of Complaint Filed Herein.

This defendant, now and at all times saving and reserving unto himself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's said fourth amended bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised is material or necessary for him to make answer to, answering says:

I.

Admits the allegations contained in paragraph I of said fourth amended bill of complaint.

II.

Admits all the allegations contained in paragraph II of said fourth amended bill of complaint, except the allegation that the Directors of the said bank created a surplus fund on the books of said bank of $5,000.00 on or about the 9th day of July, 1910; and this defendant does not know and has not been informed, save by said fourth amended bill of complaint, whether the said bank
35 created such surplus funds on the books of said bank, and therefore this defendant leaves the said plaintiff to make such proof thereof as he may be advised is necessary or proper. And this defendant alleges the fact to be that he was not a director of said bank on the said 9th day of July, 1910, and had nothing to do with and knew nothing of creating such alleged surplus of $5,000.00 on the books of said bank on or about the 9th day of July, 1910.

III.

Admits that for the purpose of enabling the said bank to pay its debts and obligations the Honorable Comptroller of Currency on or about the 11th day of January, 1912, levied an assessment and requisition upon the shareholders of said First National Bank of Salmon to the full face or par value of the shares of stock of said bank, held by each of the said shareholders, respectively, and amounting in all to the sum of $50,000. But as to how much of the same has been paid into the hands of the Receiver and how much the said Receiver will be unable to collect, this defendant does not know and has not been informed, save by the said fourth amended bill of complaint, whether or not the sum of $20,000.00 of such amount has been paid into the hands of the said Receiver, or that, owing to the insolvency of a number of said shareholders, the said Receiver will be unable to collect approximately the sum of $20,000.00 of such assessment, or that after realizing upon all
of the assets of said bank now available, or applying the same
36 to the debts and obligations thereof that a deficiency of approximately the sum of $20,000.00 of unpaid obligations will remain, this defendant leaves the said plaintiff to make such proof thereof as he may be advised is necessary or proper.

IV.

Admits that this defendant, Guy E. Bowerman, was duly elected and qualified, and thereupon became a duly qualified member of the Board of Directors of said bank at the time of its organization. But this defendant denies that he continued as such Director until the same was placed in the hands of a Receiver, but alleges the fact to be that this defendant was not a member of the said Board of Directors and did not act as a Director of said bank after about the first day of July, 1910.

V.

Denies that this defendant, Guy E. Bowerman, during the term of service as a director of said bank, or at any other time or at all, knowingly permitted or assented to the making of any loan or loans by any officer or officers, agent or agents, or servant or servants of the said First National Bank of Salmon, far or otherwise in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby, or otherwise, large or any sum or sums of money belonging to the stockholders or depositors, or any
of them, of said bank became wasted or lost. Denies that on
37 or about the 15th day of February, 1910, or at any other time or at all, the said defendant Guy E. Bowerman knowingly permitted or assented to the making of any loan or loans to the Salmon Lumber Company of any amount or nature, and especially either or any of the loans set out and contained in subdivision

(*a*) of paragraph V of said fourth amended bill of complaint. Denies that this defendant, Guy E. Bowerman, knowingly permitted or assented to the making of any loan or loans to F. M. Pollard or S. A. Pollard, husband and wife, in any amount of any kind or nature, either as set out and contained in subdivision (*b*) of paragraph V of said fourth amended bill of complaint, or otherwise. Denies that the defendant, Guy E. Bowerman, knowingly permitted or assented to the making of any loan or loans to Harry Brown in any amount or of any kind or nature or either or any of the loans set out in subdivision (*c*) of paragraph V of said fourth amended bill of complaint, or otherwise.

VI.

Denies that the defendant, Guy E. Bowerman, from the time of the organization of said bank on the 13th day of January, 1906, until the 8th day of June, 1911, when the said bank suspended business, carelessly or wilfully or negligently failed or neglected to attend any meetings of the Board of Directors of said bank during the entire, or any, period of his incumbency as Director, or wilfully or carelessly or negligently failed during said entire, or any, period to discharge his duty or duties or obligation or obligations as a member of the Board of Directors of
38 said bank in examining into or keeping well, or otherwise, informed concerning the affairs of such bank, or particularly the loans or any of them which were being made by said bank, or wilfully or carelessly or negligently during the alleged or any period failed to exercise proper or other or any supervisory authority, as such Director, over said bank's affairs, or any of them. Denies that this defendant, Guy E. Bowerman, was a Director of said bank after the first day of July, 1910. Denies that during the, or any, period when the affairs of said bank are alleged to have been grossly or otherwise mismanaged, or particularly during the period when the alleged excessive loans, or any of them, were made, this defendant had any knowledge from the published or other statements of said bank, required to be furnished by the Comptroller of Currency, or otherwise, or from other sources, that the affairs of said bank were being grossly or otherwise mismanaged, or that excessive or illegal loans were being made, or that the said defendant Bowerman carelessly or negligently or wilfully permitted or allowed the said King Lottridge, or any other person or persons, to make such or any loan or loans, or particularly the alleged loan to the said Salmon Lumber Company, or F. M. Pollard or S. A. Pollard, or Harry Brown, as alleged in said fourth amended bill of complaint, or otherwise, whereby the funds or any of them of said bank became lost, as set forth in said fourth amended bill of complaint, or otherwise.

39 VII.

As to the allegations contained in paragraph VIII of said fourth amended bill of complaint, that the said Salmon Lumber Company

during the time said alleged excessive loans were being made to it became insolvent and was thereafter compelled to suspend business, with assets insufficient to satisfy and discharge its liabilities, that no part of the money so loaned to said Lumber Company by said bank has ever been repaid to said bank, except the sum of $2,360.00 and the further sum of $1500.00, or that a loss will result to said First National Bank on account of said loans of approximately $10,000.00, this defendant does not know and has not been informed, save by the said fourth amended bill of complaint, and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary or proper. As to the further allegation contained in paragraph VIII of said fourth amended bill of complaint, that no part of the alleged $7,950.00 loaned to said F. M. Pollard and S. A. Pollard was ever repaid by them to said bank, or that although judgment has been recovered on said notes, so executed by said Pollard, the same remains unsatisfied except for a credit of $150.00, or that the balance of the money so loaned to said Pollards will be lost to the said bank, this defendant does not know and has not been informed, save by said fourth amended bill of complaint, and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary and proper.

40 And as to the further allegation contained in said paragraph VIII of said fourth amended bill of complaint, that the said Harry Brown is insolvent, or, although he has turned over to said plaintiff all his available assets, no more than approximately $2,000.00 will be realized therefrom, or that the balance of said alleged excessive loans so made to him, in said fourth amended bill set forth, will be lost to said bank, this defendant does not know and has not been informed, save by said fourth amended bill of complaint and therefore leaves the said complainant to make such proof thereof as he may be advised is necessary and proper.

VIII.

Denies that at the beginning of the year 1909, or at any other time or at all, this defendant, Guy E. Bowerman, as a member of the Board of Directors of said bank, or otherwise, entered upon or participated in a careless or negligent management of the affairs, or any of them, of said bank. Denies that on or about the month of March, 1909, or at any other time or at all, the said Board of Directors without protest from or with the knowledge of this defendant, Guy E. Bowerman, negligently or carelessly or without due or any regard to the rights, or any of them, of the stockholders, or any of them, of said First National Bank of Salmon, purchased all or any of the assets of a rival bank in said town of Salmon, to-wit: The Bank of Langsdorf & Company, paying therefor the sum of $14,500.00 over or above the par or face value of the assets thereof, or also or

41 otherwise $14,500.00 over or above the true value of the assets of said bank, and denies that all, or any, of which was at the time of said purchase well or otherwise known to this defendant, Guy

E. Bowerman, or should have been known to the said Guy E. Bowerman, if he had used proper or any care or diligence in determining the value of said assets at or prior to the time of said purchase. Denies that by reason of any negligence or carelessness of this defendant, Guy E. Bowerman, in not ascertaining the true value of said assets, or otherwise, or in paying therefor out of the funds of said First National Bank of Salmon the sum of $14,500.00, or any other sum in excess of the true value thereof, the money, or any part thereof, of the stockholders of said First National Bank of Salmon became thereby or otherwise lost or negligently or otherwise wasted to approximately the sum of $14,500.00, or any other sum. And this defendant, Guy E. Bowerman, alleges that he did use all proper care and diligence in his power in regard to the purchase of the alleged bank of Langsdorf & Company, and denies that he was guilty of any negligence or carelessness in respect thereto; denies that he consented to the payment therefor, or that he paid therefor out of the funds, or any of them, of said First National Bank of Salmon, the sum of $14,500.00, or any other sum, or in any other thing or at all, in excess of the true value thereof.

IX.

Denies that the defendant, Guy E. Bowerman, during his term of office as a Director of said bank, or at any other time or at
42 all, wilfully or carelessly or negligently failed to properly or otherwise manage or conduct the affairs, or any of them, of said bank, or wilfully or carelessly allowed the same to be grossly or otherwise mismanaged, whereby or otherwise the assets or any of them of said bank were wasted or lost.

X.

This defendant, Guy E. Bowerman, alleges that if between the first day of January, 1910, and the failure of said bank on the 8th day of June, 1911, the said defendant, Harry G. King, as President, and John Lottridge, as Cashier, of such bank, carelessly or negligently loaned the funds, or any of them, of said bank to various persons or companies upon insufficient or no security, or to various other persons or companies not having sufficient assets with which to repay the same, whereby large or any sums of money belonging to the depositors or stockholders of said bank became lost or wasted, or carelessly or negligently or wilfully made large or other loans of the funds of said bank to the officers thereof, or to companies in which some of said officers were interested, or which alleged loans or any of them made as alleged in said bill or otherwise, were far or otherwise in excess of any amount justified by the financial standing of the persons or companies to whom said loans or any of them were made, or carelessly or negligently or wilfully, or in direct or other violation of the by-laws, or any of them, of said bank permitted the money or funds or any part thereof of said bank to be paid
43 out upon checks or orders, or otherwise, *or* various persons or companies that did not have sufficient or any funds in such

bank with which to pay such checks or orders, whereby large or any sum or sums of money of said stockholders or depositors became wasted or lost, as alleged in paragraph X of said fourth amended bill of complaint, or particularly those loans referred to in subdivisions (*a*), (*b*) and (*c*) of said paragraph X of said fourth amended bill of complaint, the same was done by the said defendants King and Lottridge without the assent, permission or knowledge of the defendant, Guy E. Bowerman, and against his will and over his protest.

XI.

This defendant, Guy E. Bowerman, denies that during the time he was a Director of said bank, or at any other time or at all, he wilfully or carelessly or negligently failed or neglected to attend any of the meetings of the Board of Directors of said bank, or negligently or carelessly or wilfully failed during the time when such alleged wrongful acts, or any of them, were committed, or at any other time, to examine the books or records, or any of them, of said bank to ascertain said bank's condition or to ascertain the amount of overdrafts or loans, or any of them, allowed or made to various or any patron or patrons of said bank; or wilfully or carelessly or negligently failed during the long, or any period, when such alleged mismanagement, or at any other time, was going on to exercise as such Director, or otherwise, proper or any supervisory authority of
44 said bank's affairs, or any of them, whereby or otherwise said loss, or any loss, might or could have been prevented or avoided. Denies that this defendant, Guy E. Bowerman, had any knowledge of any kind or nature that the affairs or any of them of said bank were being grossly or otherwise mismanaged, or had any knowledge that excessive or illegal loans were being made to various or any person or persons or company or companies, or that the defendant carelessly or negligently or wilfully permitted or allowed the said King or Lottridge, or any other person or persons, to make said excessive or illegal loans, or any of them, as alleged in said bill or otherwise, whereby or otherwise the funds, or any of them, belonging to the stockholders or depositors of said bank became lost or wasted, as alleged, or otherwise.

XII.

Denies that on the 9th day of June, 1910, or at any other time or at all, owing to any careless or negligent conduct or wrongful or illegal act or acts of the defendant, Guy E. Bowerman, as set forth in said fourth amended bill of complaint, or otherwise, during the time this defendant, Guy E. Bowerman, was a Director of the said bank, or at any other time or at all, the capital or surplus of said bank had become much or otherwise impaired, or the value of the assets, or any of them, of said bank greatly or otherwise depreciated. Denies that this said defendant, Guy E. Bowerman, wilfully or knowingly or wrongfully assented to the declaring of a dividend out of the available assets of such bank in the sum of $2,500.00,

45 or any other sum, or wilfully or knowingly accepted his proportion of said dividend. Denies that the defendant, Guy E. Bowerman, in violation of law or otherwise, knowingly or carelessly or negligently permitted or assented to the carrying of the sum of $4,500.00, or any other sum, to the surplus account of said bank, thus or otherwise showing on the alleged books, or any of them, the right to make any loan in excess of the amount which could have been legally loaned had the books, or any of them, shown the true condition of the affairs of said bank. Denies that the said Guy E. Bowerman wilfully or knowingly accepted his proportion, or any proportion of said alleged dividend, or with knowledge that the said bank was being mismanaged or that large or excessive or other loans were being made in violation of his oath as such Director, or otherwise, or without exercising proper or any supervisory control over the affairs of any of them of said bank, which as Director of said bank he was in duty bound to do, or otherwise; and denies that the said Guy E. Bowerman wilfully or carelessly or negligently permitted the said dividend or any dividend to be declared, or the alleged sum of $5,000.00 or any other sum to be carried to the surplus or other account of said bank, as alleged in said fourth amended complaint, or otherwise.

XIII.

Denies that at the time of the closing of said bank, or at any other time, the said defendant, Guy E. Bowerman, during his term
46 as Director of such bank, or at any other time, in violation of the or any by-law of said bank, or in violation of his duty as a Director of said bank association, carelessly or negligently failed to supervise the affairs, or any of them, of said bank, or permitted to be paid checks or orders drawn on said bank by persons or companies not having any funds on deposit in such bank with which to pay the same, to the extent of $9,800.00, or any other sum, or that many or any of the persons who made such overdrafts were insolvent, or have been or now are unable to repay the money, or any part thereof, so drawn out, or as a result thereof a large or any amount of the money alleged to be so paid will be lost to the said bank. Denies that if the defendant, Guy E. Bowerman, had performed his duty or duties as a Director of such bank, or supervised the affairs or any of them of said bank, he would have known that said overdrafts, or any of them, were being permitted or would have stopped the same or said losses, or any part thereof, would not have occurred. But, on the contrary, this defendant alleges that this defendant, Guy E. Bowerman, did perform his duty as a Director of said bank during the time he was such Director, and did supervise the affairs thereof as best he could under the circumstances.

XIV.

As to the allegation contained in paragraph XIV of said fourth amended bill of complaint, that the loss which will result to the said

bank on account of the said excessive loans will reach a prob-
47 able amount of $20,000.00, or that the losses which will result to such bank from the alleged overdrafts will reach the probable amount of $4,000.00 or more, or that the losses which will result to such bank from the declaration of the alleged illegal dividend will reach the amount of $2,500.00, or that all such losses are directly caused by the careless or negligent handling of the funds, or the mismanagement of the affairs of said bank, or the wilful neglect of this defendant, Guy E. Bowerman, as a Director of said institution, as alleged in said fourth amended bill of complaint, this defendant does not know and has not been informed, save by said fourth amended bill of complaint, and therefore demands strict proof of the same.

XV.

Denies that the complainant has not a plain, adequate and complete remedy at law.

For a further answer and defense, this defendant, Guy E. Bowerman, alleges as follows:

That at the time of the organization of the First National Bank of Salmon the defendant, Guy E. Bowerman, was elected a Director of said bank by the stockholders of the same, and he immediately qualified and took the oath of office as a Director of said bank; that at the time of his election and qualification as a Director of said bank he was residing at St. Anthony, in Fremont County, State of Idaho,
quite a long distance from Salmon City, Lemhi County, State
48 of Idaho, where the said First National Bank of Salmon was situated, and it was very difficult at said time to reach said Salmon City by reason of the inadequate transportation facilities then existing between St. Anthony and said Salmon City; that no provision was ever made by either the stockholders or directors of said bank for paying this defendant for his time or expenses in going to and from St. Anthony to Salmon City to attend the meetings of the Board of Directors of said bank.

That it was understood at the time this defendant was elected a director of such bank by the stockholders, who elected him such director, that this defendant, by reason of his residing at St. Anthony so far away from Salmon City, and because of the inadequate transportation facilities then existing between St. Anthony and the said Salmon City, and because of the amount of business that this defendant had upon his hands at such time, that this defendant was not to and could not take an active part in the control or management of the affairs of said bank, but was to lend only such assistance as he could under such conditions and circumstances and at such distance as he was located from the place of business of said bank, and that the actual control and management of the business of said bank was to be entrusted to the care and supervision of the officers and agents of said bank residing at Salmon City, State of Idaho; and with this understanding and not otherwise, this defendant consented

to become a Director of said bank, and qualified as such and gave the affairs and management of said bank as much supervision,
49 control and attention as it was possible for him to do, considering his time, health, and the distance that he was located from the place of business of said bank, and the difficulty in going to and from Salmon City to St. Anthony at that time; and that the affairs of said bank and the business of such bank were properly conducted and well managed, so far as this defendant could learn or was able to tell, and that the said bank was doing a good and prosperous business until some time during the early part of the year 1910, at which time the affairs and business of said bank were not being conducted in a right or proper manner and in accordance with the ideas of this defendant as to how a banking business should be managed and conducted as near as this defendant could learn at that time; that this defendant remonstrated with Harry G. King, President of said bank, in regard to the manner in which the affairs and business of said bank were being conducted and refused to approve of certain things that had been done and were then being done; that when his advice, protests, suggestions and demands were unheeded and the said President and other officers of said bank refused to heed or follow the same, this defendant then tendered his resignation as a Director of said bank to the said President, Harry G. King, and refused to continue to serve as a Director of said bank any longer or further; and that on or about the — day of January, 1911, after this defendant had so tendered his resignation as a Director of said bank and refused to serve any longer as a Director
50 thereof, the stockholders of said bank at their annual meeting elected this defendant a Director of the same again, but the same was done during the absence of this defendant and without his knowledge or consent; that when this defendant was notified of his election as such Director and a blank oath was sent him for his qualification as such Director this defendant positively refused to qualify or act as a Director of such bank, and this defendant has not been a Director of said bank since about the first day of July, 1910.

Wherefore, this defendant prays that the plaintiff take nothing by his fourth amended bill of complaint, and that this action be dismissed as against this defendant, Guy E. Bowerman, and that this defendant have judgment against the plaintiff for his costs in this action expended, and for such other and further relief as to this Honorable Court may seem just and meet in the premises and agreeable to equity.

GUY E. BOWERMAN,
Defendant,
By MILLSAPS & MOON,
Residence: St. Anthony, Idaho;
RICHARDS & HAGA,
Residence: Boise, Idaho,
Attorneys for Defendant Guy E. Bowerman.

STATE OF IDAHO,
County of Ada, ss:

J. H. Richards, being first duly sworn, deposes and says: That he is one of the counsel of record on behalf of the defendant, Guy E. Bowerman, and that the said defendant, Guy E. Bowerman, is absent from Ada County, State of Idaho, where this affiant
51 resides, and by reason of which this affiant makes this verification; that this affiant has read the foregoing answer to plaintiff's fourth amended bill of complaint and knows the contents thereof, and that he believes the same to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 23rd day of September, 1914.

[SEAL.] EDNA L. HICE,
Notary Public.

Endorsed: Filed September 24, 1914. A. L. Richardson, Clerk.

In the District Court of the United States for the District of Idaho, Eastern Division.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, B. F. OLDEN, FRED G. HAVEMANN, and JOHN LOTTRIDGE, Defendants.

52 *Decision.*

June 21, 1915.

Jesse R. S. Budge and J. M. Stevens, Attorneys for Plaintiff.
Millsaps & Moon and Richards & Haga, for Defendant Bowerman.
E. W. Whitcomb, for defendants Edwards, Andrews and King.

DIETRICH, *District Judge:*

The First National Bank of Salmon City is in the course of liquidation, and its Receiver, Frank R. McCormick, brings this action against its directors to recover damages, on the ground of their alleged mismanagement of its affairs. There was no service of process upon the defendants, Buck, Havemann and Lottridge, nor is it seriously contended that upon the record judgment for any amount against Edwards would be warranted; as to these four defendants, therefore, the suit will be dismissed without further discussion.

There remains for consideration the liability of the defendant

Harry G. King, who was at all times the President or Cashier, and the active managing officer of the bank; Norman I. Andrews, who was the Vice President, and actively engaged as an executive officer; and Guy E. Bowerman, who was a director, but nothing more. With the possible exception in the case of Bowerman, of a part of the year 1911, these three were directors during the entire
53 period of the bank's existence, which was from January 13, 1906, until June 8, 1911. On the latter date there was a voluntary suspension, and on August 8, 1911, the Comptroller of the Currency, deeming the institution to be insolvent, placed it in the hands of a Receiver.

Originally the bank had a capital stock of $25,000.00, but on February 5, 1910, this was increased to $50,000.00. The books showed a surplus of $1,000.00 on January 7, 1908; an additional $4,000.00 on January 5, 1909; $5,000.00 more on February 5, 1909; and still an additional $5,000.00 on July 9, 1910, making a total of $15,000.00. Upon taking charge of the bank, the Comptroller levied one hundred per cent assessment upon the stock. A large part of this is uncollectible, and it is apparent that the total assets will be insufficient to pay the depositors in full. The question, therefore, is, can the Receiver recover in this action on behalf of the creditors, and, if so, what amount.

There are five general charges of misfeasance: (1) That in March, 1909, the Board of Directors, with the active participation of some, and without the protest of any, of the defendants, carelessly and negligently bought out the rival bank of Langsdorf & Company, by paying $14,500.00 in excess of the par value of the assets. (2) That on July 9, 1910, when there was no warrant for so doing, they declared a dividend of five per cent, and on account thereof distributed $2,500.00 to the stockholders. (3) That from time to time, and in violation of a by-law expressly prohibit-
54 ing the practice, overdrafts were allowed, of which items aggregating approximately $3,900.00 are found to be uncollectible. (4) That the defendants made, or knowingly permitted to be made, loans in excess of the limitation provided by Section 5200 of the Revised Statutes, whereby large sums were lost. (5) That at various times they made, or knowingly permitted to be made, loans of divers amounts to persons who were unworthy of credit.

In qualifying as directors, each of the defendants was required by law to take an oath, that he would, "so far as the duty devolved upon him, diligently and honestly administer the affairs" of the bank, and that he would "not knowingly violate, or willingly permit to be violated, any of the provisions" of the national banking statutes. (Sec. 5147 R. S. U. S.). By Section 5239 (R. S. U. S.) it is expressly declared that: "If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate, any of the provisions of this title * * *, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages," etc. Considering

the nature of the wrongdoing charged, it is thought that these statutory provisions, rather than the general rules of the common law, furnish the measure of the defendants' duty and responsibility. Briggs v. Spaulding, 141 U. S. 132. Yates v. Jones National Bank, 206 U. S. 158. Thomas v. Taylor, 224 U. S. 71.

55 Liability of Defendant King.

In view of King's intimate knowledge of and active participation in the transactions of the bank, manifestly his responsibility in the premises represents the maximum of responsibility for any one of the defendants; his liability will therefore be considered first.

The Langsdorf & Company Purchase.

This matter I am inclined to dispose of summarily. The evidence is wholly insufficient to warrant a finding that in making the purchase the directors violated any duty. Even in the light of the wisdom which comes only after the event, it cannot be said that it was ill-advised; and undoubtedly it was in good faith. The purchase price was not unreasonable, and upon the whole I am inclined to think that it was easily within the range of sound business discretion. The mere fact that as a part of the assets so purchased there were loans which in amount exceeded the limit to which national banks are confined is quite immaterial. Allen v. Xenia First National Bank, 23 Ohio St. 97. Assuming that such loans were retired when they fell due, there was no semblance of a violation of the national banking act. Nor is it of importance that what is called a bonus was paid. No reason is apparent why a national bank may not pay a premium for what it regards as good paper, bearing a high rate of interest, or should put aside the consideration that such purchase will remove from the field an active competitor.

56 The Dividend.

The dividend of five per cent, ordered on July 9, 1910, was probably in fact unwarranted, but it does not necessarily follow that the defendant is liable under the law for the return of the $2,500.00 thus distributed to the stockholders. This is not a suit against the stockholders to recover moneys erroneously paid to them, which in equity they are not entitled to retain. If the defendant is liable at all in this action, he is liable for the whole amount of the dividend, on the theory that, disregarding the obligations of his trust, he knowingly violated the provisions of the law. His duty in this respect is defined by Section 5204 (R. S. U. S.), which prohibits the withdrawal of any part of the capital of a banking association. It is declared that if losses have at any time been sustained equal to or exceeding the undivided profits on hand, no dividend shall be made, "and no dividend shall ever be made * * * to an amount greater than its net profits then on hand, deducting there-

from its losses and bad debts." Except for such inference as may be legitimately drawn from the fact that upon liquidation in the latter part of 1911 the bank was found to be then insolvent, there is no evidence of its condition on July 9, 1910. But while, if standing alone, this fact might imply an unhealthy condition of business at an earlier date, when viewed in the light of other features of the record, it is of little probative value. In the first place, it is to be noted that the pleadings do not call into question the propriety of
the action of the directors in setting apart as surplus $1,-
57 000.00, $4,000.00 and $5,000.00, on January 7, 1908, and
January 5th and February 5th, 1909, respectively. Indeed it is expressly alleged that the bank "did a large and profitable business after its organization until the close of the year 1909." The evidence does not support the view that the Langsdorf purchase in the spring of 1909 was detrimental, but the impression I get from the entire record is that, up to some time in 1910, the business of the institution was prosperous. A railroad was building into Salmon City, and, as is the common experience in such cases, the abnormal amount of money thus put into circulation for labor and supplies coupled with the natural disposition of the community to over-estimate the financial value of a railway connection, unduly stimulated values and business enterprise. In 1909 the road was completed to Salmon City, and, contrary to expectations, it terminated there, and further construction work was abandoned. The community was again thrown back largely upon its former resources. In the meantime another bank had been opened, and presumably was securing some of the business which would otherwise have gone to this bank. And during the year the defendant was drawn into litigation, which, while it did not directly involve the bank, still, because of its nature and the publicity given to it, had a tendency to undermine public confidence. In view of these conditions, it is entirely possible to reconcile the theory of prosperity and
profit up to July, 1910, with the fact of insolvency a year
58 later. It is needless to point out that a banking business is
of a most sensitive character, and radical changes are not infrequently wrought in a very short time. The three large losses upon which the plaintiff, relies, and which are next to be considered, are highly illustrative. Two of the debtors were manufacturers of building materials, much in local demand in 1910, and the other was a retailer of such materials. Had building operations continued in 1911 as in 1910, it is wholly inprobable that there would have been any loss upon these accounts; the enterprises of these three borrowers would in all likelihood have been profitable, and they would have been able to take care of their obligations. Building ceased and left them bankrupt and the bank with a loss of between twenty and twenty-five thousand dollars. Moreover, notwithstanding the shrinkage of assets resulting from these unfavorable conditions, another bank in the community offered in June, 1911, to take over the business of this bank, and pay the creditors in full, but apparently the proposition failed to secure the approval of the Comptroller of the Currency. In consideration of these conditions, I am

unable to conclude that the action of the board in declaring the dividend, and in setting apart a surplus fund on July 9, 1911, signifies either bad faith on the part of the defendant or a careless or unreasonable exercise of judgment. I am satisfied that he did not knowingly or intentionally violate the law.

Overdrafts.

The Receiver finds that overdraft accounts approximating $3,800.00 are uncollectible. There is no substantial proof upon
59 the proposition that the numerous individuals to whom these overdrafts were allowed were at the time unworthy of credit; in other words, so far as appears, if, instead of accepting and paying the checks as they came in, the defendant had taken notes from the borrowers for equivalent amounts, there would have been no ground for complaint. The national banking law does not prohibit overdrafts. It does, however, authorize the association to adopt by-laws, and the plaintiff rests upon the terms of a by-law here adopted soon after the organization of the bank, unqualifiedly prohibiting officers and employes from paying any check unless the drawer thereof had on deposit a sufficient amount for that purpose. The defendant explained that in adopting the by-laws, a form had been used, and that this provision was not considered, and that in practice it had never been complied with. In view of banking customs quite universally prevailing in this section of the country, I am inclined to think that the explanation should be given full credence. So general has the practice been of honoring checks by which accounts of customers are sometimes overdrawn in small amounts that I doubt whether it would have been possible for this bank to have succeeded in building up a business at all had the strict terms of this by-law been observed. It is wholly improbable that the stockholders intended such a radical innovation. Notwithstanding the pronounced tendency of the last four or five years toward the adoption of more rigid banking rules, it is to be
60 questioned whether even today a rigorous enforcement of such a by-law would be found practicable, at least unless all the banks in a given business district joined in such a policy. The independent action of a single bank would result in much irritation and a material loss of patronage. No doubt is entertained that the adoption of the by-law was an inadvertence, and that if any person interested was conscious of its existence he was entirely content that it should become a dead letter. Surely the stockholders must have known that overdrafts were continuously being allowed, and no objection was interposed. It is altogether unlikely that the depositors had any knowledge of the existence of such a by-law, and in the absence of such information they would naturally assume that the bank would carry on its business in the customary way, and would therefore in some instances permit customers to overdraw their accounts. In the reports published from time to time, as required by law, large items of overdrafts were reported. By all concerned there was in effect an acquiescence in the practice, and no one should now

be heard to complain. Moreover, if the defendant is to be charged with losses incident to this general and long continued usage, he ought also to be credited with the profits. Undoubtedly patronage was thus secured and held for the bank, and most of the loans thus made were repaid with interest. Upon the whole, I am inclined to think that it would not only be harsh, but unjust, to hold the defendant liable under this head.

61 Excessive and Improvident Loans.

The other two charges, namely, that excessive loans were allowed, and that loans were carelessly made to individuals not entitled to credit, while involving distinct questions of law and fact, may be considered together, because they relate to the same loans. These were three in number, and represent the bulk of the plaintiff's claim. One was made to the Salmon Lumber Company, a corporation organized and controlled by relatives of the defendant. On July 1, 1910, its liabilities to the bank amounted to $3,500.00. Additional sums were borrowed by it from time to time during the latter part of the year, with the result that in January, 1911, and at the time the bank closed its doors, the indebtedness aggregated $15,000.00 besides accrued interest. It is impossible to determine the precise amount of the loss that will be sustained, because of certain contingent interests of the debtor, whose affairs are in the hands of a Receiver or trustee, but I estimate it at $7,000.00. Another loan was to F. M. and S. A. Pollard, for $7,950.00, as evidenced by two notes, one for $6,250.00, dated June 29, 1910, and another for $1,700.00, dated July 11, 1910. It is found that there will be a loss on account thereof of $7,800.00. The third loan was to one Harry Brown. It is evidenced by two notes, dated January 2, 1911, one for $6,500.00, and the other for $6,250.00, making an aggregate of $12,750.00. The loss on this item I find will amount to $11,760.00.

62 Section 5200, R. S. U. S., as amended by the act of June 22, 1906 (34 Stat. 45), provides that the total liabilities of a borrower shall not at any time exceed one-tenth of the unimpaired capital stock and surplus of the bank. At the time these loans were made the defendant may have reasonably thought, and I am inclined to credit him with the belief, that the capital, and the surplus of $15,000.00, were unimpaired, and in that view he could, without wrongdoing, loan to any one person up to $6,500.00, but no more. These loans, therefore, insofar as they exceeded the amount, were in violation of the statute, and the defendant must be held responsible for the resulting loss; and that is the extent of his liability. True, there is the additional charge that, aside from the question of the statutory limitation, the loans were improvidently made, in that the debtors were not entitled to credit, and that therefore the defendant was wanting in the exercise of reasonable care. It may be that in their maximum amount the loans passed the bounds of prudence; that question it is unnecessary to decide, for we have already reached the conclusion that the defendant must be held

liable for the excess over $6,500.00. Further consideration, therefore, may be confined to the question whether or not credit to the extent of $6,500.00 involved a want of reasonable care. In the Pollard loan there is no reason to suspect any improper motive; the defendant's sole interest was that of an officer of the bank. In the case of the Salmon Lumber Company, there is the disturbing influence of kinship. The Brown loan had an indirect connection with the business of the Lumber Company, but it is too re-
63 mote to justify an inference of conscious wrongdoing. The defendant himself explains the circumstances under which the loans were made, and, accepting it as substantially correct—and there is no evidence to the contrary—I am inclined to think that he was warranted in extending credit in each case up to the statutory limit. It must be borne in mind that the full amount of these loans was not made all at once. When credit was first promised it was not anticipated that so much would be required. The needs of the borrowers expanded beyond expectation, and, as is a common experience, it may have been here found necessary to extend further credit in order to protect the existing loan. As already explained, the lines of business in which these three debtors were engaged were naturally the first to suffer from the depression which followed the "boom" attending the building of the railroad, and the fact that their enterprises, for which the original loans were made, turned out to be unsuccessful does not under the circumstances necessarily reflect upon the defendant's judgment, and certainly does not signify bad faith or want of ordinary care. Upon the whole, I am inclined to the view that in extending credit up to the statutory limit he acted with ordinary prudence.

In conformity with the foregoing conclusions, if, as I think must be done, we apply the amounts which the Receiver has been able to, or will, collect, first to the payment of that part of the loan which was legally made, the liability of the defendant may be
64 stated as follows: On account of Salmon Lumber Company loan, $7,000.00; on account of Pollard loan, $1,450.00; on account of Brown loan, $6,250.00; making a total of $14,700.00.

While I have found the conduct of the defendant wrongful, it was not of a flagrant character. I am inclined to think that he continued to extend credit after the limit was reached with the hope of protecting the existing loan, and while this consideration does not excuse, it tends to extenuate the fault. He received no benefit from the use of the money. No interest will therefore be allowed. Eastfield v. McKeon, 208 Fed. 580. Stephens v. Phenix Bridge Co., 139 Fed. 248. Union Steamboat Co. v. Chaffin, 204 Fed. 412. White v. United States, 202 Fed. 501. La Conner, etc., v. Widmer, 136 Fed. 177. Redfield v. Ystalyfera Iron Co., 110 U. S. 174.

Liability of Norman I. Andrews.

While the defendant Andrews participated less actively than King in the management of the bank, it is thought that his legal responsibility is substantially the same. The penalty for knowingly

permitting a violation of the law is not less than for knowingly violating it. Andrews lived at Salmon City, and was frequently in the bank. He was the Vice President, and for the period during which the transactions covering these three loans took place, he was receiving a salary of $100.00 per month; he was also a member of the committee on loans and discounts. That he knew of the making of the loans, and acquiesced, without protest or objection, can hardly be doubted. It is a reasonable inference to be drawn from the evidence, and if the fact were otherwise it is to be presumed that, being present during the trial, he would not have remained silent.

65

Guy E. Bowerman.

The status of Bowerman is somewhat different. He had no executive duties, and received no compensation. He resided and was engaged in business at St. Anthony, a distance of approximately two hundred miles from Salmon City, a considerable part of which had to be traveled by stage until the railroad above mentioned came into operation. It further appears that he never attended a meeting of the Board of Directors, nor were notices of meetings sent to him. That he did not participate in, or expressly assent to, or have anything personally to do with the making of the loans in question must be conceded, and by his counsel it is most confidently urged that he is therefore without culpability. While there are expressions in some of the decided cases which seem to support the view that liability cannot be predicated upon mere ignorance and inaction, but that there must be active participation or positive assent, it is in effect conceded that liability may arise from negligence so gross as to amount to knowledge and assent. Briggs v. Spaulding, 141 U. S. 132. Thomas v. Taylor, 224 U. S. 71. Generally speaking, it must be held, I think, that "directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers." Martin v. Webb, 110 U. S. 7, 15. Making application of this principle, it becomes quite immaterial that customarily no notice of board and stockholders' meetings was sent to Bowerman. He must have known that meetings were being held. He made no request to be notified, and offered no protest or complaint against the practice of holding the meetings without giving him notice. He cannot, under such circumstances, be relieved from responsibility upon the ground that the meetings were so held; his acquiescence was equivalent to consent, and in law he must be deemed to have had notice. It is not a case where, contrary to custom, there was a failure to send notice to a director, of a meeting where action was taken for which it is sought to hold him responsible.

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A closely related question, but one not so free from doubt, is suggested by the defendant's non-residence. For the plaintiff it is urged that the fact is without significance, while upon the other

side it is put forward as of controlling importance. The sounder view is thought to lie between the two extremes. Upon the one hand, a director must be something more than a mere figure-head; there is no such thing as a nominal directorship. It is a matter of common knowledge that directors are usually chosen because of their standing in the community, and for the purpose, among others, of inspiring public confidence, and drawing business to the bank. Their names are carried upon the stationery, and in advertising literature,
67 as a sort of a guarantee that the management of the bank will be in good hands. Gibbons v. Anderson, 80 Fed. 345. Campbell v. Watson (N. J.), 50 Atl. 120. Warren v. Robinson (Utah), 57 Pac. 287. Williams v. McKay (N. J.), 18 Atl. 824. Marshall v. Bank, 85 Va. 676, 17 Am. St. Rep. 84. Be the circumstances what they may, a director rests under the obligation to give a reasonable measure of attention to, and to exercise reasonable diligence in protecting, the interests of the bank. But, upon the other hand, what his duty may be in any specific case must be determined in the light of the circumstances of the case, for here, as elsewhere, questions of negligence are to be decided not by the application of some schedule of specific duties, but by reference to the circumstances of each particular case. No one, for instance, would seriously affirm that the failure of a director to attend a board meeting always and under all circumstances amounts to a breach of duty. It may or may not constitute negligence, depending upon the conditions of the particular case. No one expects or assumes that any director will always be present, and to require constant attendance would be to exact a measure of diligence in excess of what is reasonable. As was said in Rankin v. Cooper, 149 Fed. 1010: "Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers
68 of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible." See also: Briggs v. Spaulding, supra; Yates v. Jones National Bank, supra; Thomas v. Taylor, supra; Mason v. Moore, 73 Ohio St. Rep. 290, 4 L. R. A. (N. S.), 597; Movius v. Lee, 30

Fed. 298; Chesbrough v. Woodworth, 195 Fed. 875; Warner v. Penoyer, 91 Fed. 587. In this last case it was said: "As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. * * * The
69 Court cannot decree upon conjecture. As against two of the directors, the case for the complainant is predicated upon their failure to attend the semi-annual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank."

Now in the light of these principles it becomes manifest that the defendant's non-residence is one of the material circumstances that must be considered in determining whether or not he was negligent. The share-holders doubtless all knew where he lived, and if any depositor had any information touching his standing or qualifications as a member of the board he doubtless also knew that he resided at St. Anthony, and was there engaged in the banking business. Having this knowledge, he would not, as a reasonable man, assume that the defendant would frequently spend a week's time in taking the long stage and railroad trip to attend a board meeting, or that he would give attention to the details of the administration. For him to have been in regular attendance would have entailed hardships and a loss of time and money wholly disproportionate to the apparent need for his presence. No one would have expected it, and to do more than anyone expects is generally to exercise not ordinary, but extraordinary, care.

In speaking thus, I am not to be understood as holding that
70 the defendant could with propriety absent himself from all the board meetings during a course of several years, or remain in ignorance of the general policies and general course of business in the bank. Even though he never went to Salmon City, he might, through the medium of reports from time to time keep himself measureably well informed. By reason of his business experience, and especially his long experience in banking, he would know what to require in such reports, and it is to be assumed that, generally speaking, the desired information would be given, and given correctly. Insofar as the action of the board of directors is concerned, he could, without great expense or trouble, have had a transcript of the minutes of their meetings from time to time. While he could not, without being present at the board meetings, formally give effect to his views, he could, if he found the executive officers inclined to indulge in improper practices, or to pursue unwise policies, exercise a measure of restraining influence through correspondence. In the absence of evidence to the contrary, I think it must be assumed that he thus kept himself advised; for neglect to employ means of information so obvious and inexpensive would clearly be chargeable as negligence.

True, in a letter from the defendant to King, dated August 29, 1911, there are statements to the effect that he had difficulty in procuring information, but the letter can hardly be regarded as competent proof of this fact. The letter was written after disaster
71 had befallen the bank, and the statements referred to are plainly self-serving in character. The communication was introduced in evidence by the plaintiff only for the purpose of establishing an admission on the part of the defendant that he had knowledge in July, 1910, that the executive officers were pursuing certain policies which he regarded as unwise. In this connection it should be added that the defendant was not called to the witness stand to explain to what policies the letter refers, nor did he choose to testify in his own behalf, although he was present at the trial. The letter itself furnishes no proof of a knowledge of excess loans.

Now, assuming that the defendant had the information which he would naturally acquire by infrequently attending board meetings, and from a reason system of reports, can it be held that he is in anywise responsible for these loans? Did he, with knowledge, remain silent and inactive, when he should have spoken and made active opposition, and did he thus knowingly assent to, or knowingly permit the loans to be made? The evidence is perhaps somewhat wanting in clearness upon the point, but, as I understand, these loans, insofar as the excess is concerned, were all made between July 1, 1910, and February 1, 1911. In each case there was an agreement between King, as the chief executive officer of the bank, and the debtor, for credit, to be extended in the first place by checks drawn on account, the amount of which was subsequently to be covered by notes. At the end of the month, or at such time as King re-
72 quired, the debtor came in and gave a note for the aggregate amount of the overdrafts theretofore allowed. In the monthly report of "loans and discounts" the executive officials did not exhibit the loans so made, and they were discoverable only upon an examination of the individual depositors' ledger or upon a complete analysis of the aggregate item of overdrafts, for which no detail was reported. Neither were such loans entered in the special loan and discount register. Plainly such a system of bookkeeping and reports, if not designed to conceal, would in effect enable the executive officers to make excess loans, and to withhold knowledge thereof from the directors, unless the latter were sufficiently alert to insist upon an examination of the individual depositors' ledger. And unless a director suspected a disposition to violate the law in this respect, he might very well overlook the necessity for making such an investigation. Doubtless appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all of the directors must have had knowledge thereof and assented thereto. No loan claimed to have been excessive was made prior to October, 1909. Of dates subsequent thereto several loans or discounts are disclosed by the books in excess of $5,000.00. It must be borne in mind that of this number those which were not over $6,000.00 did not exceed the statutory

limit. As to each of the others an explanation is furnished by King which makes it clear that he did not deem them to be
73 obnoxious to the limitation. We need not consider whether his construction of the law can in all cases be upheld; to say the least, his explanations are plausible, and leave little ground to question his good faith. The real point is that the record leaves no room for doubt that he was aware of the limitation, and claimed that he was keeping within it. Surely the Treasury Department could not have been unadvised of the loans relied upon to establish a wrongful custom, but so far as appears no complaint was ever made that they were excessive. In the light of these considerations, when we consider the manner in which the three loans in controversy were made and the failure of the books and reports directly to show their excessive character, together with King's testimony, the impression is left that the executive officers of the bank were conscious that the making of excess loans was likely to elicit disapproval and criticism from some quarter; or at least that it did not have the sanction of custom. In passing upon the question of the reasonableness of Bowerman's conduct, it is to be borne in mind that he had no interest, direct or indirect, in these loans, and that he stood to sustain a substantial loss ($10,000.00 on account of his investment, and an additional $10,000.00 on account of a possible assessment of his stock) before any injury could come to depositors. A special committee on loans and discounts, as well as an examining committee, was maintained, and an additional safeguard, it was reasonable to assume, lay in the fact that the Vice-President, for whom he
74 seems to have had a high respect, was being paid a compensation sufficient to obligate him to give a substantial part of his time to the supervision of the affairs of the bank. That he should repose considerable confidence in these agencies was neither unnatural nor unreasonable. It may be conceded that in his failure to attend any of the board meetings, and perhaps in failing to exact detailed reports, he was measurably wanting in the exercise of due care, but upon the whole I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he knowingly permitted the loans to be made. As to him, therefore, the suit will be dismissed. Judgment will go against King and Andrews for $14,700.00.

Endorsed: Filed June 22, 1915. A. L. Richardson, Clerk.

In the District Court of the United States in and for the District of Idaho, Eastern Division.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Defendants.

Decree.

This cause came on to be heard at the March, 1915, term of said Court, held at the City of Pocatello, and the same having been
75 duly submitted and the Court being fully advised in the premises, upon consideration thereof:

It is ordered, adjudged and decreed, That the said defendants, Harry G. King and Norman I. Andrews, are each liable for, and that the plaintiff have and recover of and from said Harry G. King and Norman I. Andrews, and each of them, the sum of Fourteen Thousand, Seven Hundred Dollars ($14,700.00), together with his costs herein in the sum of $374.31.

It is further ordered, adjudged and decreed, That the plaintiff take nothing by reason of his complaint against the said defendants, Guy E. Bowerman and E. S. Edwards, and that as to said defendants, Guy E. Bowerman and E. S. Edwards, plaintiff's bill of complaint herein be dismissed.

There having been no service upon or appearance by defendants, George Buck, Fred G. Havemann and John Lottridge,

It is ordered, adjudged and decreed, That plaintiff's bill of complaint as to said defendants be dismissed.

Dated this 29th day of June, 1915,

FRANK S. DIETRICH,
U. S. District Judge.

Endorsed: Filed June 29, 1915. A. L. Richardson, Clerk.

76 In the District Court of the United States for the District of Idaho, Eastern Division.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Plaintiff,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, B. F. Olden, Fred G. Havemann, and John Lottridge, Defendants.

Præcipe.

To W. D. McReynolds, Clerk of the United States District Court:

You Are Hereby Respectfully Requested to incorporate into the transcript on appeal of said cause to the Circuit Court of Appeals for the Ninth Circuit the attached portion of the evidence taken at the trial of said cause.

Dated this 26th day of October, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,
Attorneys for the Plaintiff.

FRANK R. MCCORMICK, being first duly sworn, as a witness for Plaintiff, testified as follows:

My name is Frank R. McCormick. I am Receiver of The First National Bank of Salmon, Idaho, and of the First National Bank of Sutton, Nebraska. I am acting as Receiver of the First National Bank of Salmon by appointment of the Comptroller of the Currency, and was appointed September 12, 1911. As such Receiver I
77 have in my custody and under my control the books and records of the bank. The book you show me is a record which purports to be the minutes of the meetings of the stockholders and directors of the First National Bank of Salmon.

It is admitted by counsel that the First National Bank of Salmon was organized in January, 1903, with a capital stock of $25,000.00, and with the defendants named in the bill of complaint, with others, as stockholders, which is admitted in the pleading; also that prior to the failure of the bank, prior to June, 1911, the capital stock of the bank was increased to $50,000.00, and these defendants were stockholders of the bank, and were also directors of the concern.

Certain portions of the minutes shown at page 9 of the book referred to by the witness, offered in evidence and read into the record without objection, as follows:

"Directors' Meeting."

"At the adjourned meeting of the Board of Directors of the First National Bank of Salmon, held at the bank October 9, 1906, the following named directors were present: H. G. King, N. I. Andrews, M. M. McPherson, E. S. Edwards, A. J. McNab, J. C. Sinclair.

"The minutes of the meeting held September 11, 1906, were read and approved.

"The committee on by-laws presented their report, which was approved, and the by-laws embodied in the report, having been
78 read and adopted, are hereto annexed and made part of the minutes of the meeting."

Section 6 of the By-laws.

"The President shall hold his office for the current year for which the Board of which he shall be a member was elected, unless he shall resign, become disqualified, or be removed; and any vacancy occurring in the office of President or in the Board of Directors shall be filled by the remaining members."

Section 7.

"The Cashier and the subordinate officers and clerks shall be appointed to hold their offices respectively during the pleasure of the Board of Directors."

Section 8.

"The Cashier of this bank shall be responsible for all the money, funds and valuables of the bank, and shall give bond with security to be approved by the board, in the penal sum of $10,000.00, conditioned for the faithful and honest discharge of his duties as such Cashier, and that he will faithfully apply and account for all such moneys, funds and valuables, and deliver them to the order of the Board of Directors of this bank, or to the persons authorized to receive them."

Section 9.

"The President of the bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the Board of Directors or by the Cashier, or otherwise come into his hands as President, and shall give
79 bond, with security to be approved by the board, in the penal sum of $10,000.00, conditioned for the faithful discharge of his duties as such President, that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such President, and pay over

and deliver them to the order of the Board of Directors, or to any person or persons authorized by the board to receive them."

Section 11.

"The bonds of the officers shall be placed in the custody of a stockholder of this bank, to be designated by the Board of Directors, who shall not be one of the bonded officers, to be held by him only upon the order of the board."

Section 16.

"The Board of Directors of this bank shall hold regular meetings at the banking house for the transaction of business on the first Tuesday of each month, and should that day in any year fall upon a holiday, the regular meeting for that month shall be held on such other day as the directors at the preceding meeting may order."

"The board may also hold special meetings upon the call of the President, Cashier, or any three or more members, and whenever there shall be no quorum at a regular or special meeting the members present shall adjourn the meeting from day to day until a quorum shall be obtained, and any meeting may be adjourned from time to time by vote of a majority of the quorum present, but no business except adjournment shall be transacted in the absence of a quorum."

Section 17.

"There shall be a committee, to be known as the loans committee, consisting of the President, one Director, and Cashier, who shall have power to make loans, discount and purchase bills, notes, and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the Board of Directors make a report of all bills, notes, and other evidences of debt discounted and purchased by them for the bank since their last previous report."

Section 19.

"No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order, unless the drawer of such check or order shall, at the time of the presentation thereof, have on deposit in the bank funds sufficient to meet such check or order."

Section 22.

"The Board of Directors shall have power to prescribe, and, when expedient, to change the form of books and accounts to be used in the transaction of the business of this bank, and to prescribe the general or particular manner in which its affairs shall be conducted."

Section 29.

"There shall be appointed by the Board of Directors a committee of three members, whose duty it shall be to examine every
81 month the affairs of this bank, to count its cash, and compare its assets and liabilities with the accounts of the general ledger, ascertain whether these accounts and all others are correctly kept, whether the condition of the bank corresponds therewith, and whether the bank is in sound and solvent condition, and to recommend to the board such changes in the manner of doing business, etc., as shall seem desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter."

The Court: Is that the loan committee, Mr. Budge?

Mr. Budge: Yes, your Honor, the examining committee I would call it.

Plaintiff offers in evidence the minutes of the regular annual meeting of the stockholders of the First National Bank of Salmon, found at page 105, entitled: "Regular Annual Meeting of Stockholders."

"The third regular annual meeting of the stockholders of the First National Bank of Salmon was held at the bank on Tuesday, January 12th, 1909, at 4 o'clock P. M., thirty days' notice of the time and object of such meeting having been given by publication in the Lemhi Herald of Salmon, Idaho, a copy of which notice is hereto attached. Mr. N. I. Andrews was elected chairman, and Mr. J. C. Sinclair secretary of the meeting. The roll call showed 125 shares of stock present in person, as follows: H. G. King, 75 shares; E. S. Edwards, 30 shares; N. I. Andrews, 10 shares;
82 J. C. Sinclair, 10 shares. Total, 125.

"The minutes of the second regular meeting of the stockholders, held January 14, 1908, and of the special meeting of stockholders, Jan. 5th, 1909, were read and adopted.

"Mr. H. G. King and J. C. Sinclair having been appointed judges of election for directors, and the ballot having been cast, the judges of election notified the acting Cashier of the bank, and reported the following result of said election:

"N. I. Andrews received 125 votes. E. S. Edwards received 125 votes. M. M. McPherson received 125 votes. G. E. Bowerman received 125 votes. A. J. McNab received 125 votes. H. G. King received 125 votes. J. C. Sinclair received 125 votes.

"N. I. Andrews, M. M. McPherson, A. J. McNab, E. S. Edwards, G. E. Bowerman, H. G. King and J. C. Sinclair, having received the greatest number of votes, were declared elected as directors for the next ensuing year.

"There being no further business for consideration, the meeting then adjourned.

"N. I. ANDREWS, *Chairman.*

"J. C. SINCLAIR, *Secretary.*"

The attached notice referred to reads as follows:

"Stockholders' Meeting.

The regular annual meeting of the First National Bank of Salmon, Idaho, will be held on the 12th day of January, 1909, at 4 o'clock P. M., at the banking house of this association in
83 Salmon, Idaho, for the purpose of electing directors and transacting any other legitimate business.

RAY EDWARDS, *Cashier.*

Dated Dec. 4th, 1908."

The plaintiff now offers in evidence the minutes of the special meeting of the Board of Directors, found at page 117, headed:

"Special Meeting of the Board of Directors."

"A special meeting of the Board of Directors of the First National Bank of Salmon was held at the bank, Wednesday, March 24th, 1909, at 2 o'clock P. M., and the following named directors were present:

"E. S. Edwards, H. G. King, N. I. Andrews, J. C. Sinclair.

"The meeting having been called to order, H. G. King, the President of the bank, presented a report of his negotiation for the purchase of the Langsdorf & Co. state bank, and the report having been accepted, the following resolution was offered:

"Resolved, That the First National Bank of Salmon purchase the bank and good will of the banking business of J. M. Langsdorf & Co., for the bonus or premium of $14,500.00, in accordance with the terms and conditions set out in full in the written agreement to be signed by the respective parties.

"Upon motion duly made and carried, the resolution as read was passed, and a copy of the agreement of sale ordered spread upon the minutes.

"There being no further business for consideration, the meeting then adjourned.

84 "H. G. KING, *Chairman.*

"J. C. SINCLAIR, *Secretary.*"

Mr. McCormick: Plaintiff's Exhibit No. 1 came into my possession among the papers and effects of the First National Bank of Salmon. We offer Exhibit No. 1 in evidence.

Mr. Richards: We object to the introduction of Plaintiff's Exhibit 1, if the Court please, on behalf of Bowerman, for the reason that there is no evidence to show that he was present or had any notice of any such special meeting, or any proceeding as required by law.

Mr. Budge: We will supply proof later on to connect Mr. Bowerman with this transaction.

The Court: Very well, on that promise the objection will be overruled.

McCormick: Plaintiff's Exhibit 2 came into my possession as Receiver of the effects of the First National Bank of Salmon. (Exhibit 2 admitted in evidence.)

FREDERICK V. BISCOE, called and sworn on behalf of plaintiff, testified as follows:

Plaintiff's Exhibit No. 3 offered and received in evidence, being certified copies of the oaths of the members of the Board of Directors, for 1909, 1910 and 1911.

85 PLAINTIFF'S EXHIBIT NO. 3.

Oath of H. G. King, N. I. Andrews, George Buck, F. G. Havemann, and John Lettridge as Directors of the First National Bank of Salmon, taken on the 10th day of January, 1911. Oath of B. F. Olden, as Director of the First National Bank of Salmon, taken on the 9th day of February, 1911. Oath of H. G. King, N. I. Andrews, John Lottridge, John C. Sinclair, J. G. Havemann, and George Buck as Directors of the First National Bank of Salmon, taken on the 18th day of January, 1910. Oath of G. E. Bowerman as Director of the First National Bank of Salmon, taken on the 26th day of January, 1910. Oath of H. G. King, E. S. Edwards, N. I. Andrews, and J. C. Sinclair as Directors of the First National Bank of Salmon, taken on the 12th day of January, 1909. Oath of M. M. McPherson as Director of the First National Bank of Salmon, taken on the 19th day of January, 1909. Oath of A. J. MacNab, as Director of the First National Bank of Salmon, taken on the 19th day of January, 1909. Oath of John Lottridge as Director of the First National Bank of Salmon, taken on the 22nd day of November, 1909. Oath of G. E. Bowerman as Director of the First National Bank of Salmon, taken on the 16th day of January, 1909.

Each of these oaths *are* duly executed and in substantially the following form:

"STATE OF IDAHO,
County of Lemhi, ss:

We, the undersigned, directors of the First National Bank of Salmon, located at Salmon, Lemhi County, Idaho, being citizens of the United States, and all residents of the State of Idaho, do each for himself, and not one for the other, solemnly swear (affirm) that we will severally, so far as the duty devolves on us diligently and honestly administer the affairs of said Association; and that we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said Association has been organized; and, each for himself, does solemnly swear (affirm) that he is the owner in good faith, and in his own right, of the number of shares of stock required by

said Statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt."

86 My name is Frederick V. Biscoe; residence, Salmon, Idaho; occupation, bookkeeper, and am employed by Frank R. McCormick, Receiver of the First National Bank, and have been since January 15, 1914. As such bookkeeper I have to do with the books and accounts and records of the First National Bank of Salmon, and am familiar with those books. The book I hold purports to be a record of the loans and discounts of the First National Bank of Salmon, between April 2, 1906, and June 1, 1911. In this book is a record of the loans taken over by the First National Bank of Salmon from the Langsdorf Bank, which was purchased by the First National Bank.

Q. Now, please read, Mr. Biscoe, the loans so taken over, which were in excess of $5,000.00 to any one individual or firm or company.

Mr. Millsaps: We object to that, your Honor, as immaterial and incompetent and not tending to prove any issues in this case. We are not charged with taking over any loans from the bank, excessive loans from that bank.

The Court: I don't understand that to be the question. Is that the question?

Mr. Budge: Yes.

The Court: How is it material?

Mr. Budge: It is material in this: To show that the bank entered upon a course of mismanagement, and to show the date when this mismanagement commenced, and as charging the defendants with knowledge, either actual or constructive, of the mismanagement of the bank, long before the acts specifically charged to have
87 been wrongful were committed. Some of the Courts lay down the rule, or have laid down the rule in some cases, that where an act of mismanagement was an exception or was exceptional in its nature, or occurred within such a time that the directors might not be presumed to have knowledge of it, that there would be less responsibility attaching to the directors, under such circumstances, but if the mismanagement continued for a long period of time, and embraced transactions extending over several years, that the Board of Directors are held to accountability for failing to exercise the proper supervision and care to ascertain the condition of the bank.

The Court: I understand that principle, but I understand the objection to the question here is upon the ground that you are asking for what loans.

Mr. Budge: No, I am not asking for those loans. I am not asking to recover upon that ground.

The Court: But you were asking what loans taken over from Langsdorf and Company exceeded $5,000.00.

Mr. Budge: Just simply for the purpose of showing that the bank

here was making loans in excess of its statutory limit, and thereby mismanaging the bank.

The Court: But the bank didn't make these loans.

Mr. Budge: But it assumed them, your Honor, which would be just as blamable as to make the loans themselves.

88 The Court: The objection is sustained.

Mr. Budge: Note an exception.

The Court: You understand that I do not sustain this objection upon the ground that you cannot introduce evidence of similar acts to those charged, for the purpose of showing intent and knowledge, but I do not conceive that the taking over of the assets of this bank would involve transactions of a similar nature. I see nothing wrong in taking over the assets of this Company, even though those assets may have involved loans in excess of $5,000.00.

Mr. Budge: I want to say to your Honor at this time, in this connection, that we have proof here to the effect that these loans were treated upon the same basis by the Comptroller of the Currency. I shall offer in this connection this paper which I shall have marked Plaintiff's Exhibit 4:

PLAINTIFF'S EXHIBIT NO. 4.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I Thomas P. Kane, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original office record of letter dated August 10, 1909, addressed to the First National Bank, Salmon, Idaho, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereunto subscribed my name, and caused my Seal of Office to be affixed to these presents, at
89 the Treasury Department in the City of Washington and District of Columbia, this 19th day of March, A. D. 1914.

[SEAL.] T. P. KANE,
Acting Comptroller of the Currency.

Treasury Department.
Office of Comptroller of the Currency.
Form 2187—Ed. 500—F. C., July 23, '13.

Treasury Department,
Washington.

L 8080. Aug. 10, 1909.

G. T.

President, First National Bank, Salmon, Idaho.

SIR: The report of condition of your bank on June 23, 1909, shows the following loans in excess of one-tenth of its unimpaired capital stock and surplus:

J. W. Moore	$16,000
I. O. O. F. No. 5	16,000
W. J. Wettenberg	10,000
H. W. Soule, et al	7,500
H. W. Soule, et al	7,500

Immediate arrangements must be made to reduce these loans to the statutory limit. An observance of the law in this respect is insisted upon and will be strictly enforced.

The directors are requested to unite in making a prompt reply in detail to this letter over their individual signatures, stating that it has been read by them, and what steps will be taken to reduce these loans to the lawful limit.

90

Respectfully,

T. P. KANE,
Deputy Comptroller.

Excessive Loans.
Form 2248—Ed. Feb. 12-'08-4,500.

Endorsed: Filed March 9, 1915. A. L. Richardson, Clerk.

The Court: In order that I may understand you, Mr. Budge, suppose that otherwise the purchase of the assets of this bank of Langsdorf & Co. was a good business investment, would have been such an investment as any good banker would justify, and suppose that among those assets were one or two loans in excess of $5,000.00, do you contend that the purchase would have violated any law or any moral principle, or any principle of good business ethics?

Mr. Budge: Not particularly the purchase, your Honor, but I contend that it would have been necessary for the purchaser to have made arrangements, or such arrangements as might be necessary, so that this bank would not have assumed those excessive loans to any one individual, and that if it purchased the business of another bank, even though it were a good business proposition, that it would not be justified under the law in assuming responsibility indirectly which the law prevents it from assuming directly.

91

The Court: That wouldn't be assuming any responsibility; that is an asset and not a liability.

Mr. Budge: Yes, that may be true, your Honor, but it might become.

The Court: Well, if it does become—if thereafter the bank acted carelessly in handling these loans, that is another question. I am sustaining the objection now to the offer upon the ground that you are making the offer for the purpose of showing that by this act itself, the act of purchase, the directors were negligent. I cannot yield to the view that merely because there were among these assets so purchased loans which would be in excess of what these directors might make for the national bank, of which they were directors,

that that would in itself constitute negligence. I think that would be extraordinary.

Mr. Budge: So that your Honor may understand my position more clearly, it may be that the First National Bank paid, we will say, the face value of some of these loans. Now, in that sense, if the bank were amply secure and the loan were absolutely good, and nothing was lost, everything would be all right about it; but assume, for instance, that such a loan had been made and such a loan had been purchased and a loss was sustained by the bank, then the other phase of the situation will be presented and the bank was blamable for taking over such a loan and making payment for it. If a loss did occur, they have assumed a responsibility by taking over a loan which might or might not be paid.

92 The Court: You can show that. You can show that they took over bad loans. You may show that they carelessly or wilfully paid an exorbitant price, and you may show that it was a bad transaction, for the purpose of fixing the blame upon the directors. In other words, you can show anything that would indicate they had acted carelessly or negligent, or in disregard of the rights or interests of the bank of which they were directors.

Mr. Budge: My contention is that it is presumed to be negligence under the statute when the loan which they assumed responsibility for was taken over.

The Court: I can't take that view.

Plaintiff's Exhibit 5 offered and received in evidence, also Plaintiff's Exhibit 4.

PLAINTIFF'S EXHIBIT NO. 5.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Under the provisions of Section 884 of the Revised Statutes of the United States, I, Thomas P. Kane, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original letter from The First National Bank, Salmon, Idaho, dated September 8, 1909, and of the whole of such original on file and of record in my office.

In testimony whereof, I have hereto subscribed my name, and caused my Seal of Office to be affixed to these presents, at the
93 Treasury Department in the City of Washington and District of Columbia, this 19th day of March, A. D. 1914.

[SEAL.]

T. P. KANE,
Acting Comptroller of the Currency.

Treasury Department.
Office of Comptroller of the Currency.
Form 2187.—Ed. 500—F. C., July 23-'13.

H. G. King, President. N. I. Andrews, Vice-Pres't.

Ray Edwards, Cashier.

The First National Bank.

Salmon, Idaho, September 8, 1909.

T. P. Kane, Deputy Comptroller, Washington, D. C.

SIR: Replying to your favor of the 10th ult., we beg to say that the Notes of

J. M. Moore for..... $16,000.00
I. O. O. F. for..... $16,000.00
W. J. Wittenberg..... $10,000.00

have been paid in full. The Soule et al. Notes were taken by us from Langsdorf Company, Bankers, when buying the bank and will receive attention at maturity.

Yours truly,

JOHN C. SINCLAIR.
H. G. KING.
N. I. ANDREWS.
RAY EDWARDS.

Endorsed: Filed March 9, 1915. A. L. Richardson, Clerk.

94 Mr. Biscoe: The first loans in excess of $5,000.00 to any one person, firm or corporation, commencing with the month of March, 1909, is for $5,500.00 to W. H. Mulkey on October 18, 1909; on November 27th, 1909, Peter McKinney, $14,000.00; on November 29th, Walter M. Grouell, $500.00 and $6,000.00 on the same date; on December 1, 1909, Bolts & Oltmer, one note for $6,000.00, two notes for $6,000.00, and one for $500.00, all on December 1, 1909; on December 28, 1909, a loan to C. A. Carlson, $6,000.00. Also on the same date a loan to F. E. Pattee, $6,000.00. On January 26, 1910, J. M. McPherson and H. S. Waters, a loan for $8,000.00, also one for $6,000.00 on the same date, to the same parties. On February 2, 1910, to Mrs. A. Eckersell, a loan of $3,000.00, and one for $6,000.00, on the same date. On February 14, 1910, G. H. Monk & Co., a loan of $8,000.00. On February 17, 1910, G. H. Monk & Co., $6,000.00. On March 16, 1910, a loan was made to Peter McKinney, endorsed by W. H. Mulkey, $7,100.00. On April 25, 1910, two loans made to W. Hammond, of $1,000.00 and $6,000.00, respectively. On July 6, 1910, there were two loans made to F. M. Pollard and S. A. Pollard, one of $1,700.00, and the other of $6,250.00. On July 19, 1910, there were three loans made to H. W. Soule and others, of $5,000.00 each. On December 10, 1910, loan made to the Salmon Lumber Company, $[illegible],000.00. On December 31, 1910, there were two loans made to L. T. Ramsey, one of $6,000.00 and

one of $2,000.00. On January 12, 1911, there were two loans made to H. Brown, one of $6,250.00 and one of $6,500.00.

95 I have a record showing the overdrafts which were allowed by this bank between the 1st day of January, 1909, and the 8th day of June, 1911. Exhibits 6, 7 and 8 were compiled by me and represent to the best of my knowledge and belief the overdrafts shown on the ledgers of the First National Bank of Salmon, for the years 1909, 1910 and 1911, up to and including the 1st of May, and are correct as taken from the ledgers.

Plaintiff offered, and the same were received, in evidence the minutes of directors' meeting held January 12, 1909, shown on page 107 of the record book, also minutes of Board of Directors' meeting held Feb. 2nd, 1909, found at page 109; also the minutes of the Board of Directors of March 3, 1909, found at page 113, and the minutes of April 6th, of the Board of Directors, found at page 123, for the year 1909, and of May 4, 1909, at page 125, and the records of meetings of stockholders and directors, held between May 4, 1909, and June 7, 1911, inclusive, found at pages 127 to 194, both pages inclusive.

Plaintiff offered, and the same were received in evidence, the minutes of directors' meeting held on January 18, 1910, and found at page 153.

"Directors' Meeting.

"The directors of the First National Bank of Salmon, elected at the stockholders' meeting held January 18, 1910, met at the bank January 18th, 1910, for the purpose of organization as a Board of Directors, the following directors being present: H. G. King,

96 N. I. Andrews, Geo. Buck, Fred Havemann, John Lottridge, J. C. Sinclair.

"The directors present having taken the oath of office required by law, proceeded with the organization of the board, and N. I. Andrews was elected chairman, and J. C. Sinclair secretary.

"H. G. King was then duly elected president of the bank, and his salary fixed at $200.00 per month.

"N. I. Andrews was duly elected vice president of the bank, and his salary fixed at $100.00 per month.

"John Lottridge was duly elected cashier of the bank, and his salary fixed at $125.00 per month.

"Fred Havemann was duly elected assistant cashier, and his salary fixed at $100.00 per month.

"J. C. Sinclair was duly elected secretary of the Board of Directors.

"H. G. King, N. I. Andrews and John Lottridge were duly appointed as a standing committee on loans and discounts, and an examining committee consisting of Geo. Buck, Fred Havemann and J. C. Sinclair was also appointed.

"The secretary then read a letter from the Comptroller of the Treasury, dated Washington, D. C., December 18, 1909, suggesting, among other matters, that the by-laws of the bank be amended so as to require the approval by the Board of Directors at the monthly meetings of all loans and discounts, and the recording of such ap-

proval in permanent form, and upon motion duly made and carried
the following amendment to the by-laws was adopted by more
97 than a two-thirds majority of the board, all of the six directors
present voting for such amendment.

"Resolved, that the by-laws of the First National Bank of Salmon be amended by adding Section 34, and which shall read as follows: The Board of Directors of the bank shall, at each monthly meeting, or oftener, examine and approve all loans and discounts, and such approval shall be recorded in a book kept for that purpose." The Officers of the bank having been duly elected, the board was duly organized.

"There being no further business for consideration, the meeting then adjourned.

"N. I. ANDREWS, *Chairman.*

"J. C. SINCLAIR, *Secretary.*"

(Biscoe:) The indebtedness owing by the Salmon Lumber Company, on the 1st day of February, 1910, to the bank, was $3,500.00 upon a note. There is no record of it having ever been paid. There is a record of a loan of $3,500.00 outstanding on the 15th of February, 1910. Apparently on February 15, 1910, the account of the Salmon Lumber Company was overdrawn $1,597.92. On February 15, 1910, the Salmon Lumber Company gave a note to the First National Bank, numbered 2199, for $2,500.00.

Offered and received in evidence as Exhibit No. 9.

98 PLAINTIFF'S EXHIBIT NO. 9.

Note No. 2199, dated July 1, 1910, payable on demand to the order of the First National Bank of Salmon, for $2,500.00, with interest at the rate of ten per cent. per annum, and signed by Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Secretary.

On July 27, 1910, there was a loan to the Salmon Lumber Company of $3,500.00, note No. 2475.

Offered and received in evidence as Exhibit No. 10.

99 PLAINTIFF'S EXHIBIT NO. 10.

Promissory note No. 2475, dated November 2, 1910, payable on demand to the order of the First National Bank of Salmon, for $3,500.00, with interest at the rate of ten per cent. per annum, and signed by Salmon Lumber Company, Limited, by C. D. Slaughter, Manager.

On December 10, 1910, there was a loan made to the Salmon Lumber Company, No. 2551, for $6,000.00.

On February 6, 1911, there was a loan made to the Salmon Lumber Company of $3,000.00, No. 2616.

Two last above mentioned notes offered and received in evidence as Exhibits No. 11 and 12, respectively.

100 PLAINTIFF'S EXHIBIT No. 11.

Promissory note, No. 2551, dated December 10, 1910, payable on demand to the order of First National Bank of Salmon, for $6,000.00, with interest at the rate of ten per cent. per annum, signed by Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Manager.

101 PLAINTIFF'S EXHIBIT No. 12.

Promissory Note, No. 2616, dated January 4, 1911, payable six months after date to the order of the First National Bank of Salmon, for $3,000.00, with interest at the rate of ten per cent. per annum, signed by Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Secretary and Manager.

A loan was made to the Pollards on July 11, 1910, for $1,700.00, being No. 2459, and also another note on the same date, to the same parties, F. M. and S. A. Pollard, No. 2460, note dated June 29th, 1910, for $6,250.00.

The two notes, being Exhibits No. 13 and 14, were admitted in evidence.

102 PLAINTIFF'S EXHIBIT No. 13.

Promissory Note, No. 2459, dated July 11, 1910, for the sum of $1,700.00, with interest at the rate of ten per cent. per annum, payable on demand, to the order of the First National Bank of Salmon, signed by Mrs. S. A. Pollard, and F. M. Pollard.

103 PLAINTIFF'S EXHIBIT No. 14.

Promissory Note, No. 2460, dated June 29, 1910, for the sum of $6,250.00, with interest at the rate of ten per cent. per annum, payable four months after date to the order of the First National Bank of Salmon, and signed by Mrs. S. A. Pollard and F. M. Pollard.

The records show a loan to Harry Brown on or about the 19th day of July, 1910, for $3,000.00. The number is 2474. The records do not show any payment of that loan. On January 12, 1911, there was another loan made to H. Brown, of $6,250.00, No. 2592, which was admitted in evidence as plaintiff's Exhibit 15.

104 PLAINTIFF'S EXHIBIT No. 15.

Promissory Note No. 2592, for the sum of $6,260.00, with interest at the rate of ten per cent. per annum, dated January 2, 1911, payable on demand to the order of the First National Bank of Salmon and signed by Harry Brown.

105 On July 1, 1910, Harry Brown was indebted on notes to the bank, in the amount of $7,500.00, represented by four notes; none of them have been paid. On the 19th of July, 1910, there was one note of Harry Brown outstanding for $750.00; also one for $1000.00; also one for $3500.00. At the close of business on that day $3000.00 outstanding discounted on that day; and on the 19th day of July, 1910, the account of Harry Brown was overdrawn $603.80, according to the ledger. I have a list of overdrafts due the bank at the time the receivership commenced. (Reading.)

George W. Barfield, $14.50; C. G. Black, $.56; A. F. Brantegam, $78.62; Fred Brough, $52.19; Harry Brown, $110.00; James W. Caperen, $384.88; Alice Carl, $3.65; Fred Carl ranch account, $364.95; W. M. Carpenter, $14.77; Fred Crandall, $2.36; P. J. Dempsey, $35.35; Guy Edwards, $1.22; A. E. Everrett, $11.99; A. E. Ferguson, $6.36; George Geertson, $3.02; C. F. Hamner, $127.12; J. L. Harmon, $7.00. There are about three times as many as I have read. The total amount of overdrafts as shown by the books of the company, at the time of the failure of the bank, was $9,222.26.

106 Of that amount, since the failure, $5,241.37 has been collected, and the balance still outstanding is $3980.89. I have attempted to collect these, and have written them repeatedly; others are out of the jurisdiction and they are execution proof. I have made inquiry to ascertain whether they had property subject to execution.

Dr. C. F. Hanmer has no property in Salmon or that section of the country. The amount of his overdraft is $127.12.

The Idaho Coal & Land Company is not in existence now, and has no property that I know of.

John Lottridge resides in California, and has not any property in Salmon or thereabouts.

Allen C. Merritt resides at Salmon. I have made inquiry and can find no property belonging to him in the State of Idaho.

The Salmon Land & Mines Company is out of existence, and upon inquiry I find no property in Idaho.

Bert Summers resides at Salmon, Idaho, but I find no property in the State belonging to him.

Z. T. Vincent has no property.

John R. Wheeler has no property; Mira L. Wheeler, his wife, no property.

George G. Wicklund we foreclosed a mortgage on the last property he had. There was no equity whatever after the foreclosure, to satisfy this overdraft, and he has nothing now.

Fred Carl is a son-in-law of H. G. King, and has no property in the State of Idaho.

107 F. M. Pollard has nothing.

I made these investigations with respect to these various persons and others whose accounts were overdrawn, in accordance with my employment and at the request of the Receiver, and acting for him.

C. K. Slaughter is the daughter of the defendant, H. G. King. A. K. Carl is the daughter of H. G. King. F. W. Carl is H. G. King's sin-in-law. J. M. C. Lottridge is H. G. King's son-in-law. C. D. Slaughter is H. G. King's son-in-law. I am not sure that J. M. C. Lottridge is a son-in-law of H. G. King; I do not know exactly how he is related. I knew Mr. Lottridge as John Lottridge.

Exhibits 17 and 18 received in evidence.

108 PLAINTIFF'S EXHIBIT No. 16.

Articles of Incorporation of Salmon Lumber Company, having a capital stock of $25,000.00, divided into 250 shares of the par value of $100.00 each, and the subscribers being C. K. Slaughter, one share; A. K. Carl, one share; F. W. Carl, twenty-three shares; J. N. C. Lottridge, one share; C. D. Slaughter, twenty-four shares.

109 PLAINTIFF'S EXHIBIT No. 17.

Judgment Roll in an action wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon, was plaintiff, and H. G. King was defendant, being a judgment recovered against the said H. G. King for the sum of $14,397.46 for failure of the said H. G. King to pay an assessment levied by the Comptroller of the United States Currency against the shares of stock held by the said H. G. King in the First National Bank of Salmon.

110 PLAINTIFF'S EXHIBIT No. 18.

Execution levied pursuant to judgment mentioned in Plaintiff's Exhibit No. 17, and return of the sheriff on such execution, showing that the sheriff was unable to find any property belonging to the said defendant King not exempt from execution.

Exhibits 19, 20, 21 and 22 received in evidence.

111 PLAINTIFF'S EXHIBIT No. 19.

Judgment Roll in an action wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon, was plaintiff, and Ray Edwards was defendant, and wherein judgment was recovered against the said Ray Edwards for the sum of $2,631.25 for failure of the said Ray Edwards to pay an assessment levied by the Comptroller of

the United States Currency against the shares of stock held by the said Ray Edwards in the First National Bank of Salmon.

112 PLAINTIFF'S EXHIBIT No. 20.

Execution pursuant to said judgment, Plaintiff's Exhibit No. 19, and return of sheriff to such execution, showing that the said Ray Edwards had no property subject to levy and execution.

113 PLAINTIFF'S EXHIBIT No. 21.

Judgment Roll in an action wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon was plaintiff, and Harry Brown was defendant, and wherein judgment was recovered against the said Harry Brown for the sum of $18,498.39 on two certain promissory notes, as follows: No. 5595, dated January 2, 1911, for the sum of $65,000.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of the First National Bank of Salmon and signed by Harry Brown; No. 5595, dated January 2, 1911, for the sum of $6250.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of the First National Bank of Salmon, and signed by Harry Brown.

114 PLAINTIFF'S EXHIBIT No. 22.

Execution pursuant to said judgment, plaintiff's Exhibit No. 21, and return of sheriff thereto, showing that said Harry Brown had no property subject to levy and execution.

115–16 FREDERICK V. BISCOE, being first duly sworn as a witness for the plaintiff, testified as follows:

On Dec. 31. 1909, undivided profit account was charged with the Langsdorf & Company premium, $14,500.00.

With reference to the overdrafts uncollected which I heretofore stated amounted to approximately $3,000.00, I should think that it is practically all uncollectible. I have computed the balance due on the loans made to the Salmon Lumber Company. The total amount due is $13,629.20 principal, and $5,408.62 interest. The amount due on the Brown loans is $11,760.25 principal, and $5,-234.81 interest. The amount due on the Pollard loans is $7,800.00 principal, and $3,626.42 interest.

Mr. Budge: I desire to offer pages 107 to 194, both pages inclusive, of minute book marked Plaintiff's Exhibit No. 23, for the purpose of showing that no report was ever made to the board of directors by any loans and discount committee or by any examining committee, which should have reported, according to the terms of the by-laws, as well as for the purpose of showing the approval of the loans that were made during the period by the board of directors who attended these meetings, and their approval of the overdrafts which are shown in the statements set forth in the minutes of these

various meetings, and for any other purpose for which these minutes may be competent, in support of the allegations of the bill. I don't know that there are any other respects in which it would be competent, but if there are any others —.

Mr. Richards: We object to these so far as the defendant Bowerman is concerned, as there is no evidence to show that he had knowledge at any time of any of these matters offered from the exhibit.

The Court: The offer will be received, subject to this objection, and we can determine ultimately whether or not any con-
117 nection has been shown so far as the defendant Bowerman is concerned.

There was then offered and received in evidence the record of the special meeting of the board of directors, as shown at page 173 of Exhibit 23, in support of the allegation of the bill that a dividend of $2,500 was declared and the sum of $5,000 carried to the surplus account of the bank, said special meeting being held on the 9th day of July, 1910.

There was then offered and received in evidence the minutes of the directors' meeting held on the 18th day of January, 1910, shown at page 153 of Plaintiff's Exhibit 23, to show that the salary of the defendant King as President of the bank was fixed at $200 per month; that of the defendant Andrews at $100.00 per month, as Vice President.

Cross-examination:

The balance due on the loans to the Salmon Lumber Company has not been paid because the Salmon Lumber Company is at present in the hands of a Receiver. I don't know whether the Receiver has any funds on hand or not. That is why it hasn't been paid. I think there was an inventory of the lumber in the hands of the lumber company about the time the bank failed. I have no personal knowledge what it showed. I think possibly Mr. McCormick has a record of it in the bank. I don't know.

Q. Now, taking up the Langsdorf and Company matter, you mentioned the Mulkey loan for $5,500.00 as an excess loan, I believe.

118 A. The question was asked me to read all loans taken from Langsdorf & Company over $5,000, which I did. I think the register will show when that was paid. The J. N. Moore loan of $16,000.00 was paid on August 2, 1909. It was purchased on April 15, 1909. The loan to the Independent Order of Odd Fellows, $16,000.00, was paid on the 28th day of June, 1909. The W. J. Wittenburg loan for $10,000.00 was paid July 29, 1909, and was purchased on April 15, 1909. The loan of October 18, 1909, to Mulkey, $5,500.00, was paid twice, according to this record here. It was paid June 4, 1910, and December 2, 1910.

Q. Taking the loan of November 27, 1909, to McKinney, for $15,000.00.

Mr. Budge: I think this is immaterial, if Your Honor please. We don't claim anything for any of these loans.

Mr. Richards: But you claim carelessness. They were paid within 60 and 90 days after they were made.

Mr. Budge: The fact that the loans were made and that they were excess loans shows carelessness and negligence and violation of the by-laws, and violation of the law, and it don't make any difference if they were paid fifteen minutes after they were made. The offense was complete, and there was carelessness and mismanagement of the bank.

The Court: Your contention extends only to the proposition that the making of the excess loan, even though it was promptly collected and nothing was lost, constitutes negligence?

119 Mr. Budge: Yes.

The Court: And you don't claim anything further?

Mr. Budge: Don't claim anything further so far as losses are concerned from those loans.

The Court: Upon that statement, the objection is sustained.

Q. Calling your attention to the Mulkey loan of October 18, 1909, for $5,500.00, was that an excess loan at that time?

Mr. Budge: That is a mere conclusion.

The Court: Overruled.

Mr. Richards: He read it as an excess loan.

A. I am not in a position to say what an excess loan is.

The Court: If that is the situation, this evidence will be considered only on the promise of showing that it was an excess loan. Of course if you don't ultimately show that it was an excess loan, it will be stricken out.

Mr. Richards: Well, there are quite a lot of them in the same shape.

The Court: Well, all of them. In other words, it will be understood that up to the present time there is no evidence that any of these loans were excess loans.

Mr. Budge: I don't understand the statement, Your Honor, in view of the proof, and to satisfy myself I want to know the position of the Court, and therefore make the inquiry. It is conceded by the pleadings that the capital stock was $50,000.00. We have

120 introduced proof here, for instance, of a loan of $14,000.00, and obviously it is excessive. It can't help but be excessive, because the law says no loan to one person shall exceed $5,000.00.

The Court: Does it say so?

Mr. Budge: Yes, the statute fixes 10 per cent of the capital stock.

The Court: Where is the statute?

Mr. Richards: And it says a surplus——

Mr. Budge: It says nothing about surplus. Even if it did say that, it is still excessive. As shown by the books of the company that have been introduced here, and the minutes, and the financial statement of the bank, it is still excessive, taking into consideration the surplus.

The Court: Then, Mr. Budge, in order that you may understand

me, and I you, you were objecting to the witness answering this question. Now we must either assume that you have made proof or that you haven't. If you haven't undertaken to make proof that this is an excessive loan, then I will sustain the objection. If you put this witness on the stand not only for the purpose of showing that a loan was made, but that it is an excess loan, then his testimony is subject to cross-examination.

Mr. Budge: Yes, but the records show that it is. I claim that the proof shows that these are excess loans. But the witness couldn't answer whether they were excessive, because it is shown by the record, and it isn't a matter particularly within the knowledge of the witness, because it is shown by the records what amounts
121 have been carried to the surplus of the bank, and what its capital is.

The Court: If that has been shown, it hasn't been brought to my attention, as to what the surplus is. I am not advised at the present time what the surplus was.

Mr. Budge: I can call to your Honor's attention the various dates in the minutes for which the offer was made, the various dates when certain amounts were placed to the surplus.

The Court: I think I will overrule the objection and permit counsel to go into the matter. Perhaps I will get the facts that way more easily than the other.

(Last question read.)

Mr. Budge: If I might suggest, the pleading, in paragraph 2, alleges that the directors of the bank created a surplus fund on the books of said bank in the sum of $15,000.00, at the following times: $1,000.00 on the 7th day of January, 1908; $4000.00 on the 5th day of January, 1909; $5000.00 on or about the 5th day of February, 1909—all of which are admitted by the pleadings—and $5000.00 on or about the 9th day of July, 1910, which I just now offered, which is denied by the defendant Bowerman, but by nobody else, so that this pleading, with its admission, establishes what the surplus of the bank was.

Mr. Richards: $65,000.00.

The Court: Perhaps that is true then.

Mr. Budge: So that with the admissions fixing it at $65,-
122 000.00, it would show that there were excess loans, by showing the amount of these various loans that were made.

Mr. Richards: This was $5500.00, and the excess with the capital made $65,000.00.

The Court: Of course, if the facts are shown, that would be a matter of argument, as to when there was an excess loan and what it was.

Mr. Richards:

Q. February 2, 1910, Mrs. Eckerson, $3000.00, and the same date, as I understood you to give it, Mrs. Eckerson, $6000.00. Is that correct, or did you mean Mr. Eckerson?

A. The record shows Mrs. The notes have been paid. It is not to my knowledge a fact, that, notwithstanding the record, one was Mr. Eckerson and the other Mrs. Eckerson.

As to the Hammond loan of April 25, 1910, for $1000.00, and again, the same date, the same person, for $6000.00, it is not a fact according to this ledger that those were two separate loans to separate individuals. There are ditto marks underneath and no other initial in it. I don't know anything further than what the record shows as to whether it was a separate loan. It is supposed to show the individual names. It shows the initials in that case.

Q. One is Wellington and the other is William?

A. This reads "W. Hammond," and ditto marks underneath. It is simply "W."

Cross-examination.

By Mr. Whitcomb:

I have lived in Salmon nearly six years. Came there in June, 1909. Am not acquainted with George W. Barfield. I know
123 nothing about his financial circumstances. The effort that I made to ascertain as to his financial circumstances was that I inquired for his address and couldn't get it. That is as far as I went. I think I have seen letters to him. I wouldn't swear to it. From my absolute knowledge I couldn't say as to his financial ability to pay.

I am acquainted with Fred Brough. I am acquainted with his financial status in Lemhi County. I had our attorney examine the records and found out that he had a building on Main street which was mortgaged for $5000.00 and that that was all the personal property he had, and he is heavily in debt otherwise. I was told it wouldn't pay us to bring suit against him on account of his having so little equity in the building. I obtained this information through the attorney. I didn't look up the records personally. I have heard he was engaged more or less in mining in that county. I don't know that he owns some mines there. I did not hear about his bringing ore out of there this last year. I didn't hear of his shipping ore from the Leesburg district, so-called. I didn't know anything about that. I relied entirely on the attorney.

Mr. F. C. Hanmer is a practicing physician in Salmon. I made the same effort to find out his financial standing or ability to pay—through our attorney—and also by personal solicitation for the amount. He told me it was impossible for him to pay anything at the present time. He has, according to the attorney, nothing that we could get. I understand that his automobile is in
124 his brother's name. He has a shack building on the west side of the river. The only effort I made to ascertain what his interest was in the ground on which the shack is situated was, as before, through our attorney.

Mr. J. L. Hammond is not a resident of Salmon, now. He was there for some length of time. So far as I know, he is an unmarried man. I have had letters returned. I don't know him

personally. I have not been able to reach him. He didn't work in the same block where I have worked, not to my knowledge.

I am acquainted with George Leabo. His financial standing, I believe, is good, but the overdraft is disputed. We have never brought suit to test the question.

I am acquainted with John Lottridge. The effort I have made to ascertain what his financial standing has been was through our attorney. I have never looked the matter up personally. No funds have come into our office belonging to John Lottridge, not to my knowledge. I was never personally indebted to John Lottridge for money or on account of property claimed by John Lottridge.

I can't say anything about Mr. McCormick. Personally, I never have been —.

I am acquainted with W. W. Schultz. I believe we have nearly everything he has as security for some notes we hold of his. That overdraft is not covered by the security. I wouldn't like to say that our security is more than sufficient to cover the notes
125 which we hold. I think not. It is purely a question of opinion on my part.

I am acquainted with Mr. Z. T. Vincent. I think he resides in New Mexico at the present time. I am not sure about that. He is an Episcopal minister. I have written him on several occasions and received answers saying that at the present time he was unable to pay, he had nothing whatever. He never disputed the bill. The last communication received from him, I should say, was about last June.

I am acquainted with John R. Wheeler. I don't know where he resides at the present time. I have heard that at one time he resided in the city of Pittsburgh, Pennsylvania. I have heard him make the claim that he owned real property in that city. I haven't endeavored to ascertain whether this bill would be collectible against any property which he owned in that city. I don't know where he is at the present time.

I am acquainted with Joseph G. Wicklund. I have made efforts toward ascertaining his financial worth in Lemhi County through our attorney—no personal investigation.

Q. Do you hold anything, or does your bank hold anything as security for this overdraft or any indebtedness which Mr. Wicklund owes the bank?

A. We hold security for a note on which we got judgment. The amount of the note is somewhere around $1800.00. We have had judgment on it and foreclosed the mortgage. Only part of
126 the property has been sold. I believe we have some stock in some lime and brick company as security for the note turned over to us by Mr. Wicklund.

My understanding with respect to the lime claim up the Lemhi River is that it was taken up, and the assessment work hasn't been done on it, so I don't know whether they hold it now. I know they did hold it some time ago. I couldn't say personally how long they held it. I don't think they hold it now. I believe Mr. McCormick

has made an effort to realize on these certificates of stock of this brick and lime company. I have not myself. I don't know anything about that.

Redirect examination:

From my investigation and inquiries I know of no property of any of these persons, either in Idaho or elsewhere, to which I could have resorted for the payment of these overdrafts.

Recross-examination.

By Mr. Whitcomb:

To my knowledge nothing more has been paid towards the overdraft of Fred Brough. The payment of $27.19 was made before I took charge there, and nothing has been paid since.

Witness examines Exhibit A, attached to the bill of complaint, and states that the overdraft of E. E. Minart has been paid, $2.45. I think, Mr. Whitcomb, that is the only overdraft that I can recall from memory that has been paid.

F. J. COWEN, called as witness on behalf of the plaintiff, being first duly sworn, testified as follows:

127 My name is F. J. Cowen. I reside at Salmon, Idaho. I am Judge of the Sixth District Court. As an attorney, I think I represented the First National Bank of Salmon and Mr. McCormick in the case of Western Land & Savings Company, a corporation, against Saphronia A. Pollard, Frank M. Pollard and the First National Bank of Salmon, a corporation, and Frank R. McCormick, as Receiver of the First National Bank of Salmon, in the District Court of the Sixth Judicial District of Idaho, in and for Lemhi County, and am reasonably familiar with the proceedings.

Plaintiff's Exhibit 24 was offered and received in evidence.

128 PLAINTIFF'S EXHIBIT NO. 24.

Judgment Roll in an action wherein Western Loan & Savings Company was plaintiff and Sophronia A. Pollard, Frank M. Pollard, First National Bank of Salmon and Frank R. McCormick, as Receiver of the First National Bank of Salmon were defendants, and wherein the plaintiff foreclosed a first mortgage on the premises on which the First National Bank of Salmon held a second mortgage, and wherein the First National Bank of Salmon filed a cross-complaint and foreclosed its second mortgage securing the payment of two certain promissory notes, one No. 2459, dated July 11, 1910, for the sum of $1,700.00, payable on demand to the order of the First National Bank of Salmon and signed by Mrs. S. A. Pollard and F. M. Pollard, and one dated June 29, 1910, for the sum of $6,250.00, payable four months after date to the order of the First National Bank of Salmon, and signed by Mrs. S. A. Pollard and F. M. Pollard, and wherein the First National Bank of Salmon recovered a

deficiency judgment against said Pollard on said notes for the sum of $10,631.70.

128½ Mr. Richards: Is this just the complaint?

Mr. Budge: No—it is the judgment roll.

Mr. Richards: As I take it, you are offering this to show that suit was brought against the Pollards, and the failure to collect?

Mr. Budge: Yes.

Mr. Richards: But you allege here a loan in March, 1911.

Mr. Budge: You are reading, I think, from the complaint of the Western Loan & Savings Company. There is a cross-complaint of the bank. They brought the suit, and the bank came in by way of cross-complaint.

Q. Do you recall, Mr. Cowen, the sale which took place under the decree of foreclosure in this case?

A. I do. I couldn't give the date of it from memory, Mr. Budge, only approximately, but I recall the sale. I know the amount that was realized above the claim of the Western Loan & Savings Company at this sale which was applied upon the indebtedness of the bank. The amount was $150.00. That was the total amount. In a great many matters since the bringing of said action, and since the sale took place, I have, prior to my election as judge, represented the Receiver, Mr. McCormick. I am familiar with the Salmon Lumber Company. I am trustee of said company's property. The papers concerning my appointment as trustee are dated March 25, 1912, about nine or ten months after the closing of the bank. (Said papers were marked Plaintiff's Exhibits 25 and 26.) I will explain, the papers are identical in form, I think, but signed by different parties. (Said exhibits were offered and received in evidence.)

129 PLAINTIFF'S EXHIBIT NO. 25.

Power of Attorney dated March 25, 1912, and executed by C. D. Slaughter, C. K. Slaughter, Ada D. Slaughter, J. N. C. Lottridge, as all the holders and owners of all the issued capital stock of the Salmon Lumber Company, Limited, to F. J. Cowen, with power and authority to sell and manage all property belonging to the company and to collect and receive all debts and accounts due the company, and to close up the business of the company at the earliest practical date.

130 They are identical; I think one is in fact a carbon of the other. I didn't have charge of the company's property as such trustee prior to the execution of these papers. Perhaps there might have been two or three days, something like that, Mr. Budge, while the papers were being prepared and forwarded to the parties. The assets of the Salmon Lumber Company, at the time of my appointment as trustee, consisted of a stock of lumber, and a lumber office and store building and some sheds situated on leased ground, and some unpaid accounts, perhaps two or three notes, was all that ever came into my possession. The inventory that was taken about the

time that I took charge, speaking from memory, showed a value of the assets, the lumber and buildings and so forth, of between $10,000.00 and $10,500.00, as I recall it. I am unable to give the amount of the notes and bills receivable but approximately was in the neighborhood of three or four thousand dollars. The property has been disposed of, that is, a contract of sale has been made. The title hasn't entirely passed. It was sold to M. W. Freedorf, of Leadore. I think I had better make a short explanation with reference to that. We took another inventory at the time the sale was made, in November, I believe, of 1912, which showed between nine thousand and nine thousand five hundred dollars in value, other than the accounts and the notes. The buildings were situated on leased ground and when I had a chance to sell the property the party objected to taking it over without any title or any chance to stay there, in case the party owning the ground wanted him to move off, so I made arrangements to sell the property for approximately the invoice value and purchased the lot on which the buildings stood, and turned that in at about the invoice price, and paid $1,500.00 for the
131 ground. The net amount realized from the sale of these assets, taking into consideration the fact that I purchased the lot, was $7,600.00. Some of the notes and accounts outstanding have been collected. Perhaps some of them are collectible as yet, and some are not collectible.

Q. Are you able, from your familiarity with the affairs of the company, and its assets, to state what amount will be paid to creditors, what percentage of their claims?

A. I cannot state it exactly. I can state an amount, a percentage beyond which the company will not be able to pay.

Q. And would the percentage which you are able to fix in that manner, would you be certain that it would not exceed that percentage?

A. Yes, sir. I can't fix the amount that can be paid, because I can't state how much I will be able to collect, but if everything is collected which is collectible, the company will not be able to pay in excess of 50 per cent of the obligations that it had when it came into my hands. I know of a claim that was owing by the Salmon Lumber Company to the First National Bank. I am not familiar with the amounts that have been paid, except the amount that I have paid the bank on account of this matter, and so I couldn't say whether Mr. Biscoe's testimony is correct as to the balance due on it or not, except in one particular, which I think he omitted to take into consideration, and that is a credit of $1204.00, which is in a peculiar situation. The Salmon Lumber Company furnished
132 some lumber to Lemhi County for a Mr. Stone, of Leadore, and the amount, as I understand, was owing or should have been paid to Mr. Stone, but the warrants were drawn in favor of the Salmon Lumber Company in that amount, and were collected by the bank, and, as I understand, credited on the amount due the Lumber Company. Mr. Stone was also owing the bank a note of some $2000.00 at that time, and it is our understanding that that amount should have been credited to Stone's account. We brought suit

against Mr. Stone, and that credit was allowed in the action, so that it reduced his indebtedness to the bank by $1204.00, but created an obligation on the part of the Lumber Company to repay the bank the $1204.00.

Q. Now, when you say that 50 per cent is as much as you will be able to pay, do you mean 50 per cent in all, including what you have paid?

A. Yes, including what I have paid. It will not be able to pay more than 50 per cent, including what has been paid to the bank. I have paid to the bank $1500.00, according to my recollection. Mr. McCormick can correct me if that is not right. I know of no other payments made to the bank on the lumber company's account. I don't think there would be any payments other than those made by myself, but that is a mere matter of opinion. No one else would be authorized to make any payment other than myself that I know of, so that, on the total claim of the bank against the Salmon Lumber Company, as represented by the various notes that were intro-
133 duced in evidence, no other payment was made that I know of, except $1500.00.

Mr. Richards: Do you intend to show that any payments were made between the time of the failure of the bank and the time Mr. Cowen took charge?

Mr. Budge: I shall do that, yes.

Cross-examination.

By Mr. Richards:

I received from the inventory of the lumber, as shown by the inventory, somewhere between $10,000 and $10,500. The inventories have passed from my hands, and I haven't them all, and my recollection is that I also received three or four thousand dollars in bills and accounts receivable. The teams and wagons were all included in the inventory. I purchased the ground on which the lumber rested for $1500.00 and paid that out of the selling price of the lumber.

Q. Why did you take a second inventory, which you say was about $9500.00?

A. After I took charge of the property, it was in an exposed condition, and I didn't think it advisable to leave it there without somebody to look after it, and if I had somebody looking after it he might just as well be selling from the stock when opportunity offered, and in that way the stock was lessened during the period when I took charge, and when I sold to Mr. Freedorf, and in order to ascertain the amount, or to arrive at a basis to deal with Mr. Freedorf, we had to take another inventory. I don't think the lumber company will be able to pay 50 per cent, Judge Richards, but it won't exceed that amount. The sale price of $7600.00 was the very best I could
134 do. In fact, it was the only opportunity I had to sell.

Cross-examination.

By Mr. Whitcomb:

Through an agent, not by myself, I made considerable minor sales about the town before the sale to Mr. Freedorf. The $7600.00 was the net amount received on the sale to Mr. Freedorf. The expense of keeping the place running about ate up what the sales amounted to, and I could see that if I continued to pursue that method there would be practically nothing left when it was all sold out. The stock was getting in very poor condition. There were a great many culls, and the lumber in many cases was damaged, and I thought the best thing to do was to dispose of it at the best price I could get, at the first opportunity. The value of the property which I sold between the time I took possession and the time I made the sale to Mr. Freedorf would be in the neighborhood of $1000.00.

Q. You included the teams and horses in this lumber, but there was other kinds of property there otherwise than lumber, teams and horses, was there not?

A. There was a wagon or two, and perhaps a sled, but it would be property of that nature that would be used in connection with a lumber yard. There was some paper and some cement, I believe, and I don't recall what all now, but there was paper and cement. It was taken into consideration when the inventory was made. It was all inventoried as the property of the lumber company.

135 Q. What was the amount of the indebtedness of the Salmon Lumber Company other than the indebtedness to the First Notional Bank?

A. There were two notes to the Leadore State Bank, I think for $2500.00 each, upon which some payments had been made, which would reduce them to the neighborhood of $4500.00. There were some outstanding bills, and I believe a note to a Portland wholesale lumber company, the amounts of which I cannot give you now, but I wouldn't think they would exceed $1000.00 altogether. I have made payments on these other claims.

Q. And you have made these payments pro rata to the bank and the other claims?

A. Yes, except that I think I haven't given the bank, that is, the First National Bank, quite as much as I have the others. I think it is 20 per cent all around, and I think I have hardly paid 20 per cent to the bank. The total indebtedness of the company when I took charge was, as I understood, between $23,000.00 and $24,000.00.

FRANK R. MCCORMICK, recalled on behalf of the plaintiff, testified as follows:

Q. Mr. McCormick, inquiry has been made as to the payments made by the Salmon Lumber Company after the failure of the bank, between the time of the failure of the bank and the time that Judge Cowen took charge of the Salmon Lumber Company's affairs. Will you state what payments were made?

A. In the first place, there was an off-set of $484.80, made on the 11th of July, 1911. I don't remember clearly, but I presume
136 that they had that balance on the book, and we off-set it on their note, $484.80. Then there were six payments made to me at different times by Mr. Slaughter, the manager of the Salmon Lumber Company, in various amounts, aggregating $2876.00. They are marked here as credited on note 2140, all of them.

PLAINTIFF'S EXHIBIT No. 27.

Promissory note No. 2140, dated July 1, 1910, for the sum of $3,500.00, with interest at the rate of ten per cent. per annum, payable six months after date to the order of the First National Bank of Salmon, signed by the Salmon Lumber Company, Limited, and on which is endorsed "Paid account principal $2260.80, account of interest $350.00."

137 Plaintiff's Exhibit No. 27 is the note upon which the credits were endorsed. I find, however, that one credit of $100.00 is not endorsed on that note. One credit in addition to those shown thereon, and I want to add that there was $350.00 interest paid on that note, endorsed July 15, 1911. May I make a correction, Judge?

The Court: Certainly.

A. That off-set of $484.80 may have been November 7th. I think I testified to it July 11th. It is one of these seven-elevens.

Mr. Richards: It seems you haven't offered that note heretofore in the case.

Mr. Budge: No, that note hasn't been introduced before.

Mr. Richards: Why should the payments be made on that note?

Mr. Budge: I don't know why. I suppose the Receiver would be permitted to endorse them wherever he pleased, unless they requested that they be endorsed elsewhere. We contend that these credits are not on this indebtedness that is proven by the
138 other notes. You asked for payments that were made and I wanted to clear up the whole situation. We haven't any objection to showing payments, but we want to show where they were applied. I had no interest in showing the payments.

The Court: Is this note you have just shown me here in addition to those you have introduced this morning?

Mr. Budge: That is my understanding, but I didn't offer it this morning because it isn't included in the bill, but when counsel called for the payments I had to produce the indebtedness on which the credits were endorsed.

The Court: Well, proceed.

Mr. Richards: I can't see how it is material to the case at all. If it is a credit on the amount proven it is all right; if it isn't, it shouldn't be in there. It just encumbers the record. I supposed when he offered payments it related to payments applied on the notes that they proved against the company.

Mr. Budge: It was a misunderstanding. Counsel asked if I intended to show payments made prior to the appointment of Judge Cowen, and I told him I would do so, if he desired. I had no interest in showing them, but simply did it for the purpose of complying with counsel's suggestion. I didn't have to show it otherwise, and I wouldn't have shown it otherwise.

Mr. Richards: I don't care. It doesn't affect us if it hasn't anything to do with the indebtedness proven.

139 Q. Mr. McCormick, do you know anything about a company which has been referred to in the evidence as a lime company? I think it is called—it may be called the Salmon Land and Mines Company—is that it?

A. I don't recall the name of the company, but I do recall the circumstances that we had some bonds of some such company as that, or stock. It was the Lemhi Brick & Lime Company. I know nothing about the financial condition of that company, only from what I have learned from inquiry. The company is bankrupt.

Cross-examination.

By Mr. Whitcomb:

The information I received as to the financial standing of the Lemhi Brick & Lime Company was from other parties. It was from Mr. Pollard and Mr. Wicklund, who composed the company. They claimed they had some holdings. Mr. Pollard's statement was that if the bank wouldn't help him to do the assessment work he would lose everything he had. My information is that the assessment work was not done, and therefore it is simply my conclusion that they lost it all. I understood from Mr. Pollard that the land was taken up under the mineral laws. I don't know, as a matter of fact, whether they did or did not do the work. I know where the land is located. I have only seen it from the railroad as I passed by. I have seen where their operations were, from the railroad, and the lime coming from there. They told me it is of good quality. I don't know anything about it personally.

140 I don't question that fact. I haven't heard positively that the work wasn't done.

H. G. KING, a witness duly called and sworn on behalf of plaintiff, testified as follows:

My name is H. G. King. I am one of the defendants and formerly President of the First National Bank of Salmon. I know about the company known as the Idaho Coal & Land Company. It was organized by one J. D. Richards, and Lamborn and myself. It wasn't incorporated. It was a sort of a partnership, more than anything. That company has not any property now. It had property at one time but not since the failure of the bank, and has none now and hasn't had at any time since the failure. I am not familiar with the company called the Salmon Land & Mines Company. There was no such corporation as that. It was a name given, called the Salmon Land & Mines Company, by a young fellow that started in

the real estate business—well, I can hardly recall the year, it is so many years ago—he was located on the corner of the Sheenan block, and he just styled himself the Salmon Land & Mines Company. He and his father I think was really engaged in the land and investment and mining business, and he designated his title as the Salmon Land & Mines Company. I know of no property the company has had since the failure of the bank.

I know John R. Wheeler. As to his financial condition I know that he built a house there in Salmon that Mr. Langsdorf is now occupying, and I have never heard of it having been trans-
141 ferred from his name. If a mortgage was foreclosed on that property, I don't know that. Mr. Wheeler told me that he had some valuable property in Pittsburgh. The only information I have is from Mr. Wheeler and Mr. McCutcheon himself. Mr. McCutcheon knows of the property that Mr. Wheeler holds about eight miles out of Pittsburgh. The members of the corporation, the Salmon Lumber Company, that is, the stockholders in it, as shown by the articles of incorporation, Plaintiff's Exhibit 16, and also as shown by the assignments which were made to Judge Cowen as trustee, are C. D. Slaughter, my son-in-law; my daughter, C. K. Slaughter; my daughter, A. K. Carl, and J. M. C. Lottridge, formerly cashier of the bank but no relative of mine. I am familiar with certain loans that have been referred to in the evidence, made to Mr. Harry Brown. I know of a loan which was made for $6250.00, as shown by Plaintiff's Exhibit 15. Mr. Brown, the maker of this note, was in the sawmill business *of* Lick Creek, Lemhi County, and had purchased two million feet of lumber from the company, and I gave him permission to draw on the bank to a certain extent to cut this lumber. He commenced operations in 1908, I think it was, and made an overdraft by his checks, we honoring his checks as they came in. As soon as they amounted to—the first $700.00, and he came in and gave us a note for $700.00. Then on his next pay roll he still kept drawing his checks on the bank, and when it amounted to $1500.00 he came in and gave us another note for $1500.00, and later on another one.

142 The Court: Did the $1500.00 note cover the $700.00 note?

A. Covered the overdraft that had accumulated in the meantime.

The Court: So there were two notes outstanding?

A. Yes. Then later on he covered his overdraft again by giving another note. This continued in this way until it reached the sum of $6250.00, and these individual notes were consolidated then into this one note.

The Court: This large note of $6250.00 also covered any open account he had at that time, at the time the note was given—did it cover all of his indebtedness?

A. It covered all of his indebtedness at that time, yes. There was no straight loan, Your Honor, made to him for $6250.00. It was an accumulation of this indebtedness that had arisen from time to time, and eventually put into one note.

Witness was here shown Plaintiff's Exhibit 28.

143 PLAINTIFF'S EXHIBIT NO. 28.

Promissory note No. 5595, dated January 2, 1911, for the sum of $6,500.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of First National Bank of Salmon, and signed by Harry Brown.

144 Q. Is that a straight loan?

A. Just the same condition as the other loan was. I made it in two separate notes there, because, to discount one of them—I expected to discount one of them, so as not to leave it an excess loan.

Q. It was not discounted?

A. It was not discounted. I failed to discount it. That was my intention in making it that way, because the $6,500.00 would come within the law of an excess loan, and the other $6,250.00 I expected to discount. They were both made approximately at the same time. As a matter of fact, there was an excess loan of $6,250.00 on account of the fact that I failed to discount it.

Mr. Budge: In view of that explanation, Your Honor, I will say to Your Honor that we have become somewhat confused about the books and accounts in straightening out this Brown loan. I offer in evidence this $6,500.00 note, which was given on the same

145 date as the $6,250.00 note, for the purpose of explaining this transaction, and we claim an excess loan of $6,250.00, which we pleaded, but I wasn't aware of just how the matter was made up, of what the loan consisted.

The Court: When both of these notes were out, Mr. Brown owed, on account of the two notes, $12,750.00?

A. That is right, Your Honor.

The Court: One note of $6,500.00 and one of $6,250.00?

A. Yes, sir.

Mr. Richards: Of course the dates vary somewhat from your pleadings, and the amount varies entirely from your pleadings.

Mr. Budge: I shall aske leave to amend the bill, in view of the fact—the dates which we pleaded here were the dates shown on the books, which at times did not correspond, but the numbers were the same in most instances, and there were so many books and accounts here that we selected the wrong book to give the dates from, but I think with this explanation we will ask leave to amend the bill to conform to the proof in this regard, as in respect to the $3,500 loan which was pleaded as $2,500, and the dates of these other notes.

The Court: You may proceed, Mr. Budge.

Mr. Budge: I will ask the Court if the bill may be amended accordingly.

The Court: In what respect?

146 Mr. Budge: I desire to amend the pleading to show that on this date there was the excess loan made of $6,250.00, and the paragraph will have to be amended just a little bit in its phrase-

ology, so as to comply with the proof which is adduced here, and also to amend it in showing the loan made to the Salmon Lumber Company.

The Court: You are not asking to increase the amount which you claim was excessive here?

Mr. Richards: Yes, they are increasing it.

The Court: What I am trying to get at is what you want to do. What is the amendment you want to make in regard to the Brown loan?

Mr. Budge: I shall have to ask that the allegation be amended to show that between certain dates, which were named by Mr. King, Mr. Brown became indebted up to a certain amount, and that on January 2nd, the date shown by these notes, these notes were taken, and representing the loan which was then outstanding against Mr. Brown. Now we have pleaded here that on the 19th day of July Mr. Harry Brown was owing the bank $3,000.00, and an indebtedness of $603.80 on an overdraft, and that they made another loan to him of $3,000.00 on that date, which makes $6,603.00, and that on the 12th day of January, 1911, they made him a loan of $6,250.00, so that there is no increase in the indebtedness at all; it is simply a statement different from the allegations here as to the manner in which it arose.

The Court: This $6,500 note takes the place of those two $3,000 notes?

147 Mr. Budge: I assume that that is the case, under the explanation of Mr. King; I assume that the overdraft was covered by those notes.

The Court: You may amend.

Mr. Budge: And I want to ask you at this time permission to attach to the Fourth Amended Bill that schedule of overdrafts attached to the Second Amended Bill. It is by reference, but it has never been really attached to it. I would like to have it taken from the Second Amended Bill and attached to the Fourth Amended Bill.

Q. Now, Mr. King, are you acquainted with Mr. Guy E. Bowerman, the defendant?

A. I am. I think I attended all meetings of the stockholders and board of directors of my bank held between the first of January, 1909, and the time when the bank suspended business in 1911. The records would show it. I don't remember at present of being absent. I recall no meeting, either of stockholders or directors, at which I was not present. I think I was always present. Mr. Bowerman was never present at any meeting of stockholders or directors, special or regular.

Cross-examination.

By Mr. Richards:

We never notified Mr. Bowerman of any meetings.

Mr. Budge: Just a moment. I move to strike that, as immaterial, upon the ground that the by-laws fix the date when regular meet-

ings are to be held, and that no notice would be necessary as to them and he would be presumed to know when those meetings were held.

148 The Court: You asked about special meetings as well.

Mr. Budge: I mean as to regular meetings.

The Court: Well, the evidence may go in, and it will be considered for what it is worth.

We only had one copy of our by-laws, the one spread on the minutes, the one introduced here today. We didn't notify Mr. Bowerman that we had any by-laws. We just passed the by-laws there by the President and directors, and had them spread on the minutes of the meeting, and didn't have any copies printed of them and never sent him a copy, not to my knowledge. I think Mr. Bowerman, during the times mentioned here, lived at St. Anthony all the time. Anyone leaving from Salmon to St. Anthony, or from St. Anthony to Salmon, it would take practically a little over three days, or approximately three days. You have to lay over at Armstead at night. In coming from St. Anthony you first of all change at Idaho Falls; then you go on up to Armstead and the trains arrive there, I think, about three o'clock in the morning, and then you wait until eight o'clock, when the train leaves there; and then the train runs every other day. In the years 1906, 1907, 1908 and 1909, before the railroad was in there, it was a question of a two-day trip by stage from Armstead, and that continued up until the railroad was built. I forget the date the railroad run in there. 1910, yes, sir, it was. I know it was, now. Mr. Bowerman never made any trip, and we never made any arrangements to pay any expenses for Mr. Bowerman.

149 There was offered in evidence published statements of the condition of the First National Bank of Salmon, published in the issues of the Lemhi Herald, February 10th, 1910, July 7th, 1910, September 8th, 1910, November 17th, 1910, and March 23rd, 1911, which said statements were marked Plaintiff's Exhibits 29 to 33, inclusive. Said exhibits were admitted upon condition that it be shown that defendant Bowerman had knowledge of said published statements. There was also introduced and received in evidence a letter written by defendant Bowerman and marked Plaintiff's Exhibit 34, and also Plaintiff's Exhibit 35.

PLAINTIFF'S EXHIBIT NO. 34.

St. Anthony, Idaho,
August 29, 1911.

Mr. H. G. King, Salmon, Idaho.

DEAR SIR: Subject to our conversation regarding the surrender of the stock of the First National Bank of Salmon.

First, let me say by way of explaining my position, that I do not now, and never have considered myself in any way responsible for the management of the bank and its failure, as I have never had any

part whatever in actively conducting its business, and whatever censure, if any, may attach to those who have been in active charge, cannot in any way be considered in connection with the writer. As a nominal director of the bank, I commenced in July, 1910,
150 writing the President of the institution and warning him as to what in my judgment would be the consequences if the policy of the management was not changed, various matters corrected and improved and more of the notes collected, and the reserve kept up. I have also written the vice-president along the same lines. Having been a director in the institution, I felt that I would not have been discharging my duty had I not called your attention at various times, in no uncertain terms, to what seemed to me to be a very hazardous manner of conducting the bank. And this, you know, I have done repeatedly in the strongest language at my command. I commenced, as I say, in July, 1910, and I was prompted to do this by seeing the statement of the bank which was published under date of June 30, 1910. Should there be any question with any of those that you may be associated with as to whether or not this statement is true, you can no doubt produce them the original letters, and if not, copies can be furnished from my office. At no time was I consulted, either as to the management of the bank, its business transactions or its policy, and, as an illustration of this fact, I would say for your information that until after the Langsdorf purchase was made and the deal closed, I knew nothing whatever about it.

Also, in connection with the erection of the bank building, I was never advised that such a move was contemplated and knew nothing whatever about it until after the building was finished. I also state a fact when I say that I have never even received a statement of
151 the condition of the bank, from the bank, either the usual published statement or one for my personal use, without making a special request, and in some cases I have had to write several times before the statement was sent me. The conditions so far as obtaining desired information in regard to the condition of the institution were so unsatisfactory that prior to the January meeting of the stockholders and the election of directors, I had fully determined to sever my connection with the institution as a director, and I believe that an examination of your records will show that I have not accepted or qualified as a director since January, 1910, at least, I do not recall the fact of having done so.

Please understand that what I have said above is no complaint, it is merely a statement of facts, all of which is preliminary and not germane to the subject matter; the latter being a proposition I wish to make to whoever may be interested, in regard to my stock. I wish to say further, from what I can learn of Mr. Yeager, the present receiver, and his methods of doing business generally and in this case in particular, I am thoroughly convinced and firmly believe that he will not only be able to pay off all outstanding obligations, but will save something for the stockholders. Keeping that thought in mind, I can see no reason for me to surrender my stock without consideration. As I understand the offer, Mr. Emerson Hill and his associates propose to take up the business of the First National Bank and con-

tinue it, providing the $50,000 in stock, now outstanding, will be turned over to them without cost. While I realize the value
152 of this offer to those who have been actively engaged in the management of the bank and are in consequence responsible for the present condition of affairs, personally, I can only view it from a business standpoint. The ethical, or what might more properly be termed the sentimental part, does not appeal to me as it might with a resident stockholder whose local pride was at issue. As a business proposition, I admire the judgment and foresight of the men making this offer, as, in my opinion, it is a most profitable business undertaking and will result, in a few years, in a profit of $50,000 to those interested.

I would like at this time to discuss their offer and make such suggestions in connection with the reorganization as nearly thirty years of practical banking experience prompts, but this letter is already too lengthy. This is my proposition. If you will pay me $6,054.25, either in cash or good paper maturing within the twelvemonth, I will surrender my stock; or, if more acceptable, I will add to this $6,054.25 that you are to pay me, the sum of $3,943.75, and take $10,000 interest with those who are to reorganize. Certainly, under new and competent management, with ordinary business prudence and alertness, and a conservative expense account, a very large per cent of the assets could eventually be collected in full. There is no doubt a considerable prospective loss in the building and fixtures account, but I understand the income from this property is $2,700 annually and it occurs to me that say $700 of this amount
153 might be set aside each year for taxes and insurance, or whatever part of the $700 is necessary to meet these expenses, and $2,000 applied each year toward reduction, thus gradually reducing the loss. The bank has $50,000.00 capital, $15,000.00 surplus, and there must be in the neighborhood of $10,000.00 accrued interest. It seems to me to be utterly impossible for the assets of any bank to shrink one-half of this amount unless it has been intentionally and maliciously gutted. I mean that, in my opinion, it is impossible for such a shrinkage if the reorganization is affected and time enough taken in the usual course of business to nurse along and strengthen the weaker loans. My experience has been that a mighty rotten condition has existed in any institution where 90% of its notes cannot be collected, by taking a reasonable length of time and giving them vigorous attention, and I do not believe any such condition of affairs prevails in the First National Bank of Salmon with such men as Mr. Sinclair and Mr. Andrews on the board. Certainly Salmon and its vicinity is not permanently bankrupt. I believe that business conditions have touched bottom and any change whatever must be for the better. Prior to closing, as I understand it, the bank had an excellent reputation in that locality, controlled a large per cent of the outside business, and I know of no reason why, under stronger and more efficient management, it should not continue to be the leading financial institution in that section of the country. The charter and good will of the institution, even in its present condition, pro-
154 vided reorganization can be quickly effected, should be worth, to live, active men, $25,000. In view of all the conditions, I

consider my offer an exceedingly fair one and especially so, as all of the other stockholders seem to be willing, for reasons best known to themselves, to surrender their entire holdings, making the cost to these new investors merely nominal. I would much prefer to put in a little additional money, as I have suggested in this letter, and join the reorganizers in the rehabilitated institution, rather than to accept the amount which I have named, as I firmly believe and would confidently expect in a few years to recover the full amount of my original investment.

All of which is most respectfully submitted for your consideration.

Yours truly,

G. E. BOWERMAN.

Endorsed: Filed March 9, 1915. A. L. Richardson, Clerk.

PLAINTIFF'S EXHIBIT No. 35.

Monday, March 29, 1909.

H. G. King, Salmon, Idaho.

DEAR HARRY: I have received your letter of March 21st, and also the newspaper account of the taking over of Langsdorf & Company's business, but it did not seem to me that the newspaper item was particularly friendly to the First National. This, of course, may be imagination on my part, and I do not know that it would make very much difference, anyway, but I would be pleased to know if
155 everything is harmonious so far as the paper and the bank are concerned.

I, of course, do not know what the accrued interest on his loans amounted to, but in purchasing a bank the rule is to pay 90% of the accrued interest and 5% of the deposits which do not bear interest; or, in other words, you figure up the accrued interest on the loans and discounts, deduct 10% therefrom; figure 5% of the check deposits, and add the two together, and this is the price of what is termed "the good will." Figure that up and see how near it comes to $14,500.

I believe the consolidation was a good business move, but of course it makes an opening for another bank, which was to be expected, and I understand that Quarles and Edwards are organizing a banking and trust company, and of course they will get their share of the business.

The Bank Examiner has been here and he told me he had just been to Salmon so if you get time, better come out and we will have a medicine talk.

Yours truly,

G. E. BOWERMAN.

Endorsed: Filed March 9, 1915. A. L. Richardson, Clerk.

FRANK R. MCCORMICK, re-called on behalf of the plaintiff, testified as follows:

Q. Mr. McCormick, in Plaintiff's Exhibit 34 appears this language: "As a nominal director of the bank, I commenced in July,
156 1910, writing the president of the institution, and warning him as to what in my judgment would be the consequences if the policy of the management was not changed, various matters corrected and improved, and more of the notes collected, and the reserve kept up. I have also written the vice president along the same lines." Did you find among any of the papers or files received by you, as receiver of this institution, any letters signed by Mr. Bowerman, addressed to Mr. King or to the vice president, the president or vice president of the institution, containing any warning such as is indicated by this letter, or any warning at all?

A. I did not. Plaintiff's Exhibit 34 is the only letter among any of the papers received by me that relate to that subject at all, to the mismanagement of the bank.

The aggregate of the claims against this institution filed with me as receiver is $115,661.78. The amount unpaid upon the claims so filed is $57,314.16. I have in my hands or under my control as receiver, assets and property amounting roughly to $42,000.00, which can and will be applied to the payment of the balance due and owing upon these claims. This is the amount as listed. Did you wish my estimate as to the value of them?

Q. Yes, if you can give the value.

A. I should say there wouldn't be more than $12,000.00 collected of the $42,000.00. The $42,000.00 is the face value. That will leave $45,000.00 unpaid. That, I might explain, is of the principal. That doesn't include interest.

157 It was here stipulated that of the amount of the bank's claim against Sinclair, said claim being something over $10,000.00, the receiver will not realize to exceed 50 per cent, taking into consideration all payments that have been made on said indebtedness and all that will probably be made from the Sinclair estate.

It was also stipulated that the abstractor of Lemhi County and the Deputy Assessor, if present, would testify that John Lottridge owns no property in Salmon City and that the only property possessed at all or in which he has any interest stands in his wife's name, and that there are mortgages covering that, and that there is no equity in it out of which the bank could satisfy any claim, and it was further stipulated that said property is not worth more than $4500.00 and that it is mortgaged for $4500.00. Plaintiff's Exhibits Nos. 36 and 37 were then offered and received in evidence.

158 PLAINTIFF'S EXHIBIT No. 36.

Mortgage dated the 10th day of November, 1910, executed by Alice S. Lottridge and John Lottridge on Lot No. 7 in Block No. 5 of North Salmon Village, to secure the payment of their promissory note dated

November 10, 1910, for the sum of $1500.00, payable one year after date to the order of Ada D. Slaughter of Salmon, Idaho.

159 PLAINTIFF'S EXHIBIT No. 37.

Mortgage dated April 2, 1910, and executed by Alice S. Lottridge and John Lottridge on a portion of Lot 7 in Block 5 of North Salmon Village, to secure the payment of their certain promissory note dated March 21, 1910, for the sum of $3000.00, payable on demand to the order of Ada D. Slaughter of Salmon, Idaho.

160 Mr. Budge: You also admit that that is the only property that is shown on the records in his name, or hers?

Mr. Whitcomb: I never heard of his owning any other in Lemhi County.

Cross-examination.

By Mr. Whitcomb:

I resided in the John Lottridge house situated on the property referred to for some time. It must have been a year and a half. I secured the property by the consideration of a rental I paid. I paid the money to Mrs. Alice S. Lottridge, from whom I rented the property. I did not know at that time that it was community property. That question was never raised and I never inquired. I did not endeavor to ascertain whether I could apply that rental money to any of the indebtedness of the bank or not. I paid $30.00 a month at first and then it was reduced to $20.00. I paid a total of four or five hundred dollars.

Q. What were the total assets of the bank when you took charge of it?

A. I would explain that I took charge of the bank in September, but that I was charged with the bank as it stood on the 7th day of June, when it was closed, so that any figures I would give would refer back to the 7th of June, although I was not actually in charge until September. The total assets at date of suspension, $325,624.12. They consisted of notes, $279,979.32; other assets, $45,644.80. The other assets would include everything in the way of assets except the notes. There was the equity in the Pioneer Bank Building, the set of bank furniture and fixtures in the Pioneer Bank building, and the set of bank furniture and fixtures in use by the First National Bank. The part of these assets which constituted overdrafts
161 at that time was something in excess of $9,000.00. The total liabilities at that time were $273,719.14. That did not include the capital stock which was issued by the bank. I received from an assurance association $17,000.00 and from the stockholders $24,364.00. I expect yet to receive from shareholders or stockholders $2,500.00 to $3,000.00 from the Sinclair estate, and if I should receive $3000.00 from the Sinclair estate it would make a total from stockholders of $27,000.00. Since I have been there I have paid to the depositors of the bank $58,347.62 and I have on hand at

the present time $90.95. Let me explain: This is from our report made the 31st of December. There have been, of course, some few transactions since that time. No depositors were paid and no dividends paid prior to the time I went in and took charge.

Q. What is the total amount of money which has been collected by you and your predecessors in office as receiver of this bank, the total, gross?

A. There has been $3250.00 collected by the Comptroller from interest on the bonds that we have held. Counting that, the total amount collected is $244,729.65, that is money.

Redirect examination.

By Mr. Budge:

But after all, as a summary of the condition so far as the assets and liabilities are concerned, there will be approximately $45,000.00 unpaid, taking into consideration what I may yet realize from assets now in my hands.

Recross-examination.

By Mr. Whitcomb:

162 I stated that I had about $45,000.00 assets now, on which I would realize about $12,000.00.

It was stipulated and agreed that Frank M. Pollard, to whom loans were made as set forth in a bill of complaint, said loans being evidenced by plaintiff's Exhibits 13 and 14 is insolvent, and has been since the failure of said bank.

Fred V. Biscoe, being recalled on behalf of the plaintiff, testified as follows:

With reference to the Harry Brown loans, there was no security taken until after the receiver was in charge. There was no security taken at the time the loan was made for the Pollard loans or for any of the loans of the Salmon Lumber Company. I believe there was some security taken for the Pollard loan in the shape of the mortgage which is referred to in the cross-complaint of the receiver, in the case of Western Loan & Savings Company against Pollard, which is shown by Plaintiff's Exhibit 24, after the receiver or the bank examiner had charge and that is the proceeding in which the bank realized $150.00 on the security so taken and is the only amount that has been paid on those loans.

Cross-examination.

By Mr. Millsaps:

There was a lot taken on the Pollard loan; that was the one Mr. Budge mentioned and that is still owned by the bank. The value of the lot has been estimated by two real estate agents. We still own the lot. We bought it for $150.00. We have been trying to sell it.

Cross-examination.

By Mr. Whitcomb:

163 I am not entirely familiar with just what property was turned over to the bank by Harry Brown. Most of that was turned over before I was in charge. I understand that he gave a mortgage on his property. I couldn't say personally whether Brown turned over to the bank all his property or not. I know he turned over some. I don't know how much lumber he turned over to the bank.

Redirect examination.

By Mr. Budge:

I have offered this lot for what we bought it for and we have had no offers to purchase at that price or any other price.

FRANK R. MCCORMICK, being recalled on behalf of the plaintiff, testified as follows:

The chattel mortgage given by Brown after the failure of the bank covered a sawmill from 30 to 40 miles from Salmon, and the lumber, the sawed lumber—I don't know how many feet; there were several hundred thousand feet. Brown gave me written authority to dispose of that as best I could and apply it on his debt. That lumber I had hauled to Salmon, paying $10.00 or $10.50 a thousand for the hauling; rented a lot in Salmon and started into the lumber business, selling off as we could from time to time. That lumber account, the expense of the hauling and all, used up all the proceeds. There wasn't $10.00 one way or the other; I can tell from the books exactly what it was; but I don't think there is $10.00 left, and there is still a bill outstanding that would wipe that out. The sawmill we sold for $1,000.00 which was credited to Brown. That is all
164 the property we received from Brown and all we have received upon the indebtedness of Brown to the bank was $1,000.00.

With reference to the overdraft of Mr. John R. Wheeler I made an investigation concerning what property Mr. Wheeler had in Pittsburgh, through John S. Went, an attorney of Pittsburgh that had acted for me in some other matters. He reported that he found no property belonging to Wheeler except a dwelling house in Sewickley, one of the suburbs of Pittsburgh, but that that was so covered by mortgages and other liens that it would be a useless expense for us to take a judgment against Wheeler.

Cross-examination.

By Mr. Whitcomb:

I sold the lumber after it arrived in Salmon at various prices, whatever we could get, in little lots; some of it as high as $20.00 a thousand, but it deteriorated very rapidly. I don't know that values were going down; there wasn't much demand and most of it was sold for flumes and other purposes where rough lumber was used. I

knew what the market value of lumber was about the time I came to Salmon. I inquired. I found that good lumber in the yards there was selling some of it as high as $25.00 a thousand. This was rough lumber that I got. There were no teams or sleds or wagons or anything of the kind turned over to me by Mr. Brown.

Q. Did you know what the value of this sawmill was that you sold for $1,000.00?

A. I saw the mill; I inspected it. I don't know much about
165 sawmills, but I should have supposed that the mill was worth $3,000.00, if it were in any place where it could be used. But it was 40 miles from Salmon, in the woods, and $1,000.00 was the best offer we got. I don't know what creek the mill was on. There was plenty of timber there and the sawmill was well located for sawmill purposes if there had been any demand for lumber. I never heard of Mr. Brown having purchased some timber from the government. When I visited the premises there was no cut timber or uncut timber or timber which was in the form of dimension stuff that I know of, and I saw no logs. I don't know whether Brown had any interest in any standing timber. The question was never raised.

Cross-examination.

By Mr. Millsapps:

The chattel of which I spoke was given to the receiver for the bank.

Cross-examination.

By Mr. Whitcomb:

A certain paper was here marked Defendants' Exhibit 1.

I don't recall ever having seen Defendants' Exhibit 1. I do not know how it happened to be among the papers of the bank. I would explain that at one time I went down to the Salmon Lumber Company with a representative from the Comptroller's office, Comptroller of the Currency, and Mr. Slaughter, the manager, spoke of an inventory that had been made and he said that the inventory showed some figures,—he had before him a paper and whether this is the one or not I don't know. I didn't examine it. I didn't take it away with me.

166 WILLIAM C. SMITH, a witness duly called and sworn, on behalf of the plaintiff, testified as follows:

My name is William C. Smith, and I reside at Salmon. I have heretofore been Clerk of the Court at Salmon for eight years. My term expired in January, 1911. I was clerk for eight years preceding that and since that time I have been an abstractor, in the abstract business at Salmon. I think I am familiar with the records of Salmon, and the ownership of property in and about Salmon. I know Mrs. Saphronia Pollard of Salmon. I know what property she owns at Salmon. It consists of a dwelling house where she lives, a home.

I think that is all she owns now. It is encumbered for, I think, about $3,000.00. It is mortgaged for most all it is worth and she has no other property that I know of. There is a declaration of homestead on this property.

Cross-examination.

By Mr. Whitcomb:

All I know with reference to her property is what is disclosed by the records. I know of some personal property that is mortgaged, but I know nothing of any that isn't mortgaged. I don't know whether she has any United States bonds or not and I don't know whether she has made investments in real estate elsewhere than in Lemhi County.

Q. Do you not know that some time ago she owned a mortgage on some property in Lemhi County to secure a note for about $6,000.00?

A. The mortgage was for $9,000.00, I think. She held it. I know what she has done with it. She sold it to the Pioneer Bank.

167 I don't know what she did with the money. The sale was perfected prior to 1911, I can't tell you the date. It was while I was in the clerk's office; I don't know just when; I can't tell you exactly. There was an assignment of mortgage recorded at that time. Know that since the failure of this bank Mr. and Mrs. Pollard have been taking trips through the east and the south. I presume they were pleasure trips. They were east, and visited in the east and south. I don't know how they did raise the money, to take that trip. Mr. and Mrs. Pollard are old residents of Salmon. I don't believe they have made more than one trip out of Salmon in the last thirty years. I recall only the one trip and that was the one since the failure of the bank and I have resided there for forty-seven years. I am well acquainted with them as neighbors and have known them for forty years. They are now making a living by Mrs. Pollard running a bakery, selling bread, and Mr. Pollard is peddling it, peddling the bread.

Recross-examination.

By Mr. Whitcomb:

I think Mr. Pollard does work around there by the job whenever there is brick work there.

Plaintiff rests.

Mr. Richards: I move to dismiss the case as to the defendant Bowerman because they have not in anywise brought him within the terms of Section 5239 of the Revised Statutes of the United States as interpreted by the courts of the United States. I can present it very briefly.

The Court: I think, Judge Richards, that I will prefer to consider this motion at the close of the trial. I will consider it now

168 if you press it now, but I am rather disinclined to hear you at the present time unless you say that you rest your case.

Mr. Richards: I wanted to get away if possible, and it would save my remaining over another day to present any testimony.

The Court: I don't think I would want to decide the question one way or the other offhand, without giving it some consideration.

Mr. Richards: I have it very carefully briefed.

The Court: Yes, but I wouldn't have time to consider it now. If you rest your case, of course then I will hear you, but if you make this motion now and argue it I must either decide it now or hold you here until I can give it consideration.

Mr. Richards: I would appreciate it if we could have until morning, if the court is not going to hold an evening session, to determine the question. My judgment is that they haven't made any case at all, as I understand it, but the counsel who is associated with me is perhaps somewhat doubtful, and hesitates about taking the responsibility without further consideration.

At 9:30 a. m., Wednesday, March 10, 1915, the court resumed its session pursuant to adjournment.

Mr. Richards: If the court please, we have concluded to stand upon our motion, so we will have no further testimony so far as Bowerman is concerned.

Mr. Budge: It is understood that the defendant Bowerman rests then.

169 Mr. Millsaps: Not rests, Your Honor, but we say we stand upon that motion to dismiss. We will not introduce any testimony in his behalf but will stand upon that motion.

FREDERICK V. BISCOE, a witness heretofore duly sworn, being called on behalf of the defendants, testified as follows:

Defendants' Exhibit No. 1 was found by me in the office we now occupy, the receiver's office. That is where I keep the papers belonging to the First National Bank. I brought that down with me when I came here as a witness in this case. I couldn't say positively when I first saw that paper; possibly some time last spring. I have seen a good deal of Mr. Yeager's handwriting. I couldn't positively identify it. I know his signature. I wouldn't say positively that the lines written at the bottom of the last page of this exhibit are in the handwriting of Mr. Yeager. It looks like Mr. Yeager's handwriting but I am not sufficiently familiar with it to absolutely identify it.

H. G. KING, a witness heretofore duly sworn, being called on behalf of defendants, testified as follows:

My name is H. G. King. I reside at Salmon, Idaho. I am the same Mr. King mentioned in Plaintiff's bill of complaint as being the president of the First National Bank of Salmon. I was holding such office at the time I made the purchase of the Langsdorf & Company Bank. In round figures, we received in notes from Mr. Langsdorf on the purchase of the bank $167,000.00, all drawing

10 and 12 per cent interest except one note, which was drawing eight per cent interest. When Mr. Langsdorf brought over the $167,000.00 worth of notes, we paid him $14,500.00. That was all the money we paid him at the time. Having purchased the bank of Mr. Langsdorf, whereby we took over his business, he had to turn over to us all the deposits. He first of all turned over the notes, amounting to $167,000.00, and we paid him $14,500.00. The balance was placed to Mr. Langsdorf's individual credit as a deposit in the bank, the difference between the two amounts amounting to about $140,000.00. From time to time, as Mr. Langsdorf checked up with his depositors, over his preparation to turn them over to the First National Bank, as soon as he had his books balanced, he would give them a check on the First National Bank on his account, and they would bring it over and deposit it in the First National Bank. In that method the deposits of Langsdorf & Company were transferred to the First National Bank. So we weren't out anything on the hundred and forty some odd thousand dollars. The results showed that the notes we secured from Langsdorf & Company were practically all good, because they have all been paid since then. The majority of the big notes, the large notes, were all paid within ninety days; all the excess notes we got from Langsdorf with the exception of one were paid in ninety days from the time we made the purchase. The results showed that the interest that we received on the notes that we purchased of Langsdorf more than offset
171 the premium that we paid for the business, because we weren't out only $14,500.00 for $167,000.00 worth of 10 and 12 per cent paper. Besides that, we had the benefit of the depositors' money that was turned over to us in lieu of these notes, as an offset against those notes, creating a liability against the bank for which we didn't pay any interest. Furthermore, Mr. Langsdorf re-deposited his $14,500.00 and took certificates of deposit on the First National Bank, drawing only four per cent in interest, which he left there for, I think, a year. The First National Bank lost nothing on account of paying this premium of $14,500.00. The records will show that we really made money and increased our business. We doubled our business in fact. Our resources went up just double what they were before. About three or four days before we purchased Langsdorf, I consulted Mr. Claude Gatch, the National Bank Examiner, as to the advisability of the purchase and asked him if he would be willing to meet with the Board of Directors and give us his advice in the matter. Mr. Gatch met with us that evening, in the directors' room, and went over the situation, and I asked him, from a legal standpoint, more than anything, what position we would be in if we purchased Langsdorf, provided there were any loans in excess of the required limit that a bank was supposed to loan. Mr. Gatch informed myself and the board of directors that if we purchased Langsdorf & Company, that those loans would come within the prescribed
172 limits, according to section—5248, I think it is, or 5208, relating to excess loans, but that they did come under the head of commercial paper, bought against existing values, in good faith. That is the way he explained the statute to me. I was conversant with

the statute at the time. He assured me that those loans, if there were any in excess of the prescribed limit, would not be classed as excess loans, because they would come within the meaning of the law as commercial paper. Then the board asked him quite a number of questions. I remember that Mr. Andrews cross-examined him, and others of the board cross-examined him, or, rather, asked him, and he advised us in the premises that he thought, under all the circumstances, that it would be a good deal for us to buy out Langsdorf & Company. There was another thing which influenced us to take this action. I knew that another party was figuring on starting a bank in Salmon and that he had made a proposition to Mr. Langsdorf to pay him $12,500.00 premium for his business. That offer had already been made to Mr. Langsdorf and I knew it.

Q. Now with reference to the certain loans which appear by the book to have been made by the First National Bank, and which you have been shown here for the purpose of showing negligence, I wish to call your attention to the one made in November, 1909, to Peter McKinney, in the sum of $14,000.00, and inquire whether that was a loan made by you.

A. That was a note signed by two parties, I think, J. McPherson, and H. S. Waters, payable to a third party, for the purchase
173 of certain property, and Peter McKinney endorsed that note and sold it to me, and I bought it as commercial paper, and it was afterwards paid in full. I might say that Harry Loveland never reported that to the Government as an excess loan. He was a National Bank Examiner.

Q. Can you explain the two notes, one for $8000.00 and one for $6000.00, dated January 26, 1910, given by McPherson & Waters?

A. Yes, I can explain that. The $8000.00 note was simply a note that I negotiated for them, and sold it to the First National Bank of Dillon, and B. F. White held that note. I didn't hold the note at all. You won't find that it was in the bank until later than that. The $6000.00 note was a separate transaction, within the prescribed limit.

Q. On the 2nd day of February, 1910, the records show one note for $3000.00 to Mrs. A. Eckersall, and one note for $6000.00. Explain that.

A. It is listed here in the register that is presented every month to the board of directors, as a note of Arch Eckersall, and secured by a mortgage in September for $6000.00, another note to Lizzie Eckersall, his wife, secured by a mortgage on cattle that she owned, for $3000.00.

The note given by G. H. Monk & Company, for $8000.00 was taken from Langsdorf & Company, and was afterwards paid in full.

Another note from G. H. Monk & Company for $6000.00 was a loan direct from our bank, and within the prescribed limits.
174 The loan of $7100.00 to Peter McKinney, endorsed by Mulkey, I purchased from W. H. Mulkey. That was a straight out purchase, under the head of commercial paper, endorsed by a third party and that was paid in full.

As to the W. S. Hammond notes, one for $1000.00 and the

other for $6000.00, the one for $6000.00 was made to old Wellington Hammond who lived up on the Pahsimari. The $1000.00 note was made to William Hammond. Both men are well known there. They are both W. S. They are marked in the register "W," but I know that of my own knowledge,—making the deal with Wellington Hammond and the deal with William Hammond, but it has only got "W," just the initial, there. They are men well known there. There would be no other record of those loans except the notes themselves and they are paid.

The three notes given by H. W. Soule and others in the sum of $5000.00 each were paper taken from Langsdorf and eventually paid in full. The notes to L. T. Ramsey, one for $6000.00 and the other for $2000.00 were, I am sure, speaking from memory, renewal loans. One was L. T. Ramsey and the other, I think, was A. E. Murphy, endorsed by Ramsey, but they were made some 12 or 18 months before December 31, 1910. A. E. Murphy was Dr. Murphy. I would have to trace it back to the original note. If I had the note of course I could trace it back. It would take some little time to look it up, because the note was made originally
175 at the time that Ramsey bought some sheep, and that was in 1908, I think it was, and I would have to go through all the records and trace the renewals, because it wasn't a new loan at that time. I really don't know whether the $6000.00 and $2000.00 notes were paid. The receiver could tell the condition that they are in today; I don't know. I know that part of them have been paid; I know that much, but what there is left I don't know. I stated that the $6250.00 Pollard note was simply the accumulation of prior existing notes and the $1700.00 Pollard note was to cover their joint overdrafts. I allowed them to overdraw to the extent of $1700.00 because Mr. Pollard was putting up a building and he had a contract for a building with Mrs. Sheenan. Mr. Pollard wanted to burn 750,000 brick and he came to me and said that his wife was willing to go security for him and that all he wanted me to do was to advance the money to pay the labor for the men. He had the machinery to make the brick with. He went to work, and at the end of every month drew checks on the bank for his pay roll. I honored his checks, and on the Monday morning following Mr. and Mrs. Pollard would come in and give me a note for the amount of the overdraft. In that way we had several of Mrs. Pollard's notes, until it became $6000.00. That was then put into one note. In the meantime he had a brick yard there with about 750,000 brick. After these brick were disposed of Mr. Pollard was to come in and pay the proceeds that he got from the brick, the sale of the brick, to reduce the indebtedness to the bank. In
176 the meantime, there was a slow sale for brick, and he started to build a brick house, explaining that that would be the best way to utilize some of those brick and he put up that house, and eventually, to complete it, and to pay the carpenters and so on, he had to put a mortgage on it, which he did through the Western Building & Loan Association. The price of property, after he got that building finished, deteriorated very rapidly. We had quite

a reaction in real estate there, in values, and Mr. Pollard was himself unable to retain it. Later on I think Mr. McCormick sold it, or rather the Western Building & Loan sold it. I took a mortgage on the building to secure these brick, and the Western Building & Loan had the first mortgage on it, and they foreclosed on it and left us simply with the equity in, as we thought, the brick, and in that way created somewhat of a loss. In the meantime Mr. Pollard had contracted another building with Mrs. Sheenan, and put quite a good many of these brick into that building, and he got into a law suit with Mrs. Sheenan, and I don't know today whether that law suit was ever settled. If so, it was during my absence. In that way Mr. Pollard did create an overdraft, by using some more money, by drawing on me, at the time he was erecting these buildings; and I granted it for the simple reason that I expected that he would get his contract money in full on the completion of the work, which he did not, and thereby I was misled; my judgment didn't pan out the way I anticipated it would. I certainly
177 had reason to believe that Mrs. Pollard was good security at that time for the simple reason that I purchased Pollard's ranch some years before then, at a price of $30,000.00 and paid them the money, except a mortgage of $6500.00, given to Mrs. Pollard for her share in it, and I knew at the time I made this loan to Mrs. Pollard, to begin with, that she held this mortgage of $6500.00. She was doing business in her own name, and she signed those notes as a principal, and Mr. Pollard did not sign the notes as principal, and I didn't make the loan to Mr. Pollard, but to Saphronia A. Pollard, and I felt sure our money was perfectly safe, because I knew at the time that she had this mortgage and note for $6500.00, secured by 480 acres of land that was unincumbered, within a mile of town. The loans to the Salmon Lumber Company, Mr. Brown, and Mr. and Mrs. Pollard, were made by an overdraft, and I permitted—John Lottridge was cashier and I was president, and were the ones that honored the checks that were presented over the counter and created the overdraft. As to the loans made to the Salmon Lumber Company: in a general way they were doing a very large business, and how they came to owe us so much money was because they made a contract with two sawmills up at Gibbonsville to take their entire output of lumber for the year. Their original output had been quite limited, of these two mills, and in order to eliminate opposition they contracted with those mills to take their entire output. At that time they were the only two mills bringing lumber into Salmon. As soon as that agree-
178 ment was signed by the Salmon Lumber Company, the two mills immediately started in cutting lumber as fast as they could. They run those mills day and night; they hired every team they could in the county, in order to deliver as much lumber as possible to the Salmon Lumber Company. And the consequence was that it came in faster than they had means to meet it, and I stood behind their checks and paid them as they would pay for the hauling and the lumber to these respective mills. One mill alone

delivered to them over a million feet of lumber that the year before had only cut about one hundred thousand feet.

Q. Calling your attention to the note dated July 1, 1910, number 2140, was that given to cover overdrafts or was it a direct loan?

A. Well, by referring to the records here I can corroborate my statement that I think that nearly all of those loans given by the Salmon Lumber Company were given to cover overdrafts. I see here where the Salmon Lumber Company had an overdraft of $3800.00. The next day there is a credit of $3500.00 given in the shape of a note to cover it. A little later on they were overdrawn again $2500.00. There is a corresponding credit the next day of $2500.00, to cover that overdraft. Further on down, on another occasion, I see the account is overdrawn $3388.76, with a credit of $3500.00, which would be another note to cover that overdraft. That is simply corroborating the statement I made, that the loans of the Salmon Lumber Company, instead of being direct
179 loans made by the board, were created originally by an overdraft, by cashing their checks and then they came in at the end of the month, or I might call them in and ask them for a note for the overdrafts. Plaintiff's Exhibits Nos. 12 and 19 were for an overdraft. No. 27 is a renewal or consolidation of two or three notes; I don't know how many. Exhibit No. 11 is for an overdraft. The other directors, other than Mr. Lottridge and myself, didn't have any knowledge of these overdrafts, unless they were to refer to the individual depositors' ledger, or go through the individual deposit ledger and examine the overdrafts.

Q. I notice on Page 167 of the minutes of the Board of Directors that it reads as follows: "The monthly statement of loans and discounts was read and approved." How was that monthly statement made up?

A. It was made up by the special discount register that we had, that the Comptroller sent up, and—a circular letter, it was, suggesting that in future a copy of all the loans made during the month be entered in a special discount register and presented to the Board of Directors at the end of the month. Either Mr. Lottridge or myself made up the statement of the records of the loans made during the month. The special discount register was examined by the Board of Directors regularly at these monthly meetings. This book doesn't contain the notes which appear to be excessive loans. They wouldn't appear here in that way.

180 The Court: Now, just in that connection, show me what was disclosed to the board at a meeting where this minute entry was made.

A. Here are the minutes of the meeting.

The Court: I understand the minutes.

A. It says: "The monthly statement of loans and discounts was read and approved." That is, by the Board of Directors. This was the month of June, 1910, Your Honor, the month of June, approved by the Board of Directors at their July meeting.

The Court: What was it that was read?

A. We read these all out,—this loan of $100.00; W. J. and

Nancy Roos a loan of $300.00; J. R. —— to the Sheenan Hardware, a loan of $55.75. That was the list of loans made during the month, and you will find a copy of those entered on the regular discount register of the bank.

The Court: But I want to know what was read to the Board in connection with this minute.

A. This is the page, referring to the loans and discounts, Your Honor. Each month this list of loans made during the month were entered in this book by Mr. Lottridge, the cashier, or myself and presented to the Board of Directors at their monthly meeting and approved by them.

The Court: Now take a month in which some of these loans were made to the Salmon Lumber Company, some of those notes.

A. I have looked through here, and, as I have explained,
181 there isn't a note made to the Salmon Lumber Company on this book, because those were——

Mr. Whitcomb:

Q. I wish to show by comparison of these respective exhibits to which I have called your attention, to this book and show whether the book contains them or not.

A. Just call those out and I can tell you.

Q. January, 1911, $3,000.00.

A. The number of the exhibits.

Q. 2616, Exhibit No. 12.

A. No, it isn't on the book.

The Court: May I ask right there why it wasn't in this list that was read to the Board?

A. Because, Your Honor, they weren't put on there, because they were loans created by overdrafts and the loan was already done, and the note was made during the month and took the place of the overdraft, and it wasn't a specific loan, as we termed it, made to some one, and they weren't registered on this book. Exhibit No. 10, being a note given to the First National Bank on November 2nd, 1910, numbered 2475 for the sum of $3,500.00, does not appear on the discount register. Neither does Plaintiff's Exhibit No. 27, being a note given by the Salmon Lumber Company, for the sum of $3,500.00, No. 2140. Plaintiff's Exhibit No. 11, dated December 10th, 1910, for $6,000.00, No. 2551 does not appear upon the discount register nor Plaintiff's Exhibit No. 9 for $2,500.00, the number of the note, being 2191. The Board of Directors at their
182 monthly meeting or at any meeting which they had did not acquire any knowledge of the existence of these notes. Plaintiff's Exhibits No. 15 and No. 28, being notes given by Harry Brown to the First National Bank of Salmon, dated January 2, 1911, one for the sum of $6,500.00. the other for $6,250.00 don't appear on the discount register. The notes were given to cover Brown's overdraft at different times. The individual deposit ledger would show. I gave Mr. Brown credit in the matter of overdrafts because he was doing business thirty or forty miles from town and

he couldn't get in very often and he had got a contract there with the Salmon Lumber Company for the output of his mill, and I know that part of that money was furnished to pay for the two million feet of lumber that he contracted for to the Government. Then when he was working up at the mill he made his pay roll by just drawing checks on the First National Bank of Salmon, and they were in due course honored by Mr. Lottridge, cashier, or by me. We were the only two acting officers at the counter at that time. And that is how the indebtedness was created, but we didn't make any specific loan to him to begin with. I acted entirely on my own initiative and not by reason of the advice or consent of the board of directors, and that is true in relation to the overdrafts of the Salmon Lumber Company. The reason I had to believe that those notes would be paid by Mr. Brown was that Mr. Brown was making a profit, or I thought he was making a profit on every thousand feet of lumber that he sawed up there in the mill,
183 and eventually those notes would be paid in full. He bought the timber of the Government, and he had one of the best locations for a mill in Lemhi County, right up Lick Creek, in a big body of pine timber. He had an elegant mill, two large boilers, 40 and 60 horse-power boilers, and they say it was the finest mill in Lemhi County. And had the bottom not dropped out of building operations there in Salmon, and the closing of the bank, I haven't any doubt but what they would all have been paid up, the Lumber Company and Brown, and those debts would have been paid in full. And I do know that Hal Brown had a lot of lumber stored on the North Fork that was hauled to town and put on a certain lot there, and it amount- to, I think, in the neighborhood of somewhere near two hundred thousand feet. At the time these overdrafts were allowed and paid by the bank, common lumber, that is, regular common board lumber, was selling at $20.00 a thousand; I know that. The surface lumber or clear lumber, whatever it might be, varied in price all the way from $20.00 to $50.00. Brown had more clear lumber than any mill in the county, and that clear lumber was sold for $30.00. Plaintiff's Exhibit- Nos. 15 and 28, respectively, dated January 2, 1911, one for the sum of $6,500.00 and one for $6,250.00, and numbered 2595 and 2592, respectively, do not appear upon the directors' discount register. I don't remember whether I ever consulted the Board of Directors about receiving these notes for overdrafts allowed Mr. Brown. Plaintiff's
184 Exhibit No. 14, being a note given by the Pollards for the sum of $6,250.00, dated June 29, 1910, and numbered 2460, does not appear upon the discount register. The reason it didn't appear is that it is in the same category as the other notes,—they were overdrafts; they were just given to cover an overdraft. Plaintiff's Exhibit No. 13, the $1,700.00 note given by the Pollards, numbered 2459, does not appear upon the directors' discount register. I stated that the Pollard note for the sum of $6,250.00, Plaintiff's Exhibit No. 14, was given for other notes, that is, it represented an accumulation of notes.

Q. These other notes for which it was given, if they were for direct loans, would they appear upon that discount register?

A. If they were a direct loan and not to replace an overdraft, it would appear on this record—direct loans would. Renewal of a note wouldn't appear on the register. I don't remember of ever having counselled with the Board of Directors at any of its meetings with regard to these particular loans in the matter of overdrafts. Concerning the closing of the bank there are so many things that enter into that that it would take quite a little while to answer that question.

Q. State it briefly.

A. But in reality the bank was very prosperous and improving in its business connections up to the time that a certain suit was brought against me, a civil suit, by one Lamborn and Richards, in
185 which the papers, especially the Boise papers, gave me a great deal of notoriety, with regard to a certain suit having been brought against H. G. King, the president of the First National Bank of Salmon, and that was extensively used by my opponents there in Salmon, in advertising that Mr. King, as president of the First National Bank, had been sued for a large amount of money, and I noticed from that time that our business began to fall off, our deposits began to go down. On top of that we had quite a boom in real estate, and people got a little excited, and we extended credits to people that couldn't, at the time we needed the money the most, owing to the reaction that had come about in the advent of the railroad at that time, they were unable to meet their obligations. In the meantime I couldn't call in my notes hardly fast enough to pay off the depositors; deposits were going down, and it necessitated me making loans from bankers in the east, in the shape of re-discounts. The first statement that was issued, showing that the First National Bank was borrowing any money, that was utilized very strongly against me by one bank in town anyhow, and I know from personal knowledge that he started the rumor that the First National Bank was hard up, and was borrowing money. The records will show that within a very limited length of time the deposits decreased, of that little institution in that small town, some quarter of a million dollars, showed a decrease of $250,000.00 within a very limited time.

Q. That is, withdrawals?

186 A. Withdrawals. And I met all those withdrawals, and still kept above water, and, I don't want to say it egotistically, we struggled as hard as any man ever could to save that institution, and three days before the notice was put upon the door, Mr. Harry Yeager, the national bank examiner, came in on his trip there to examine the bank, and at that time we were getting very closely run; rumors were flying very fast and furious all over town, and the other banks were taking advantage of it, and it was only a question of time, in my mind, but what we would have to close the doors, provided we couldn't get some relief. And so I told Mr. Yeager. And he examined the papers, examined the institution, and went over the papers of the bank, and he said, "Mr. King," he said, "I can't close you; I can't close your doors." He says, "You are not insolvent, but," he said, "if you want to go into voluntary liquidation and stop

doing business, then," he says, "that is up to the Board of Directors; but I can't take the initiative, only on condition that I consider you are insolvent." And he wouldn't, and we consulted him a little further. I called in the Board of Directors, and really upon his advice,—he said, "The only thing you can do, if you want to close,—I can't close you, but you can go into voluntary liquidation and close your doors tomorrow morning,"—and that is what we did. A conversation occurred between Mr. Yeager and myself and others about disposing of the property so that everything would be paid in full. Mr. Yeager was immediately put in charge of the bank, as soon as that notice was on there. He was there, and naturally,
187 representing the Government, he took charge of it. A proposition was made by G. B. Quarles, the president of the Citizens National Bank, to take over the deposits of the bank, or rather to pay off the depositors and take over the assets of the bank, pay the depositors in full, issue a notice to that effect, that they would pay the depositors in full, and at the end of a year, if there were any of the assets left, they were turned over to them, after taking out a reasonable compensation for the same, they would turn them over to the stockholders. The reason why that policy wasn't carried out was, I think—I am pretty sure, that Mr. Yeager turned that proposition down. The Citizens National Bank offered to do that.

I remember Defendant's Exhibit No. 1. At the time the bank failed, at the time Mr. Yeager was there making an examination, he called my attention to the indebtedness of the Salmon Lumber Company, and he and I went over to see C. D. Slaughter, the manager. I went with Mr. Yeager, and we went over for the purpose of making an inventory and getting out a financial statement of their condition, and they worked day and night in order to get this out, and this was the result, as prepared by C. D. Slaughter and certified to by Mr. Yeager. To verify that, Mr. Yeager writes out the certificate in his own handwriting: "I hereby certify that the above and foregoing is a true and correct statement of the affairs of the Salmon Lumber Company this 13th day of June, 1911,"—and he swore Mr. Slaughter to that. Mr. Yeager made this inventory. He went over there with Mr. Slaughter and stayed over there, and when he brought
188 this back he and I talked the matter over, and he said, "They have got $36,000.00, nearly $37,000.00, worth of assets over there," and I went over it with Mr. Slaughter, and I know it, and they are perfectly solvent. The only thing that I remember, when Mr. Yeager found out the amount of merchandise they had on hand, he insisted that they take out more insurance and all the insurance was assigned to the First National Bank of Salmon.

Defendant's Exhibit 1 was here offered in evidence for the purpose of showing the amount of property which the Lumber Company had on hand, and as showing the good faith of the First National Bank in paying these overdrafts, thinking that the company had sufficient funds behind it to meet them.

189 Defendant's Exhibit No. 1, Inventory of Salmon Lumber Company, Limited, on June 13, 1911, being itemized

statement of accounts payable showing the total to be $2,108.28; also itemized statement of accounts receivable showing the total to be $6,522.85, and also statement of the assets and liabilities of the company, as follows:

Assets.

Cash in till	$35.15
Merchandise	25,683.12
Plant account	1,236.83
Building account	1,689.55
Expense account	1,650.74
Bills Receivable	90.10
Accounts Receivable	6,522.80
Total	$36,908.28

Liabilities.

Capital stock and surplus	$10,000.00
Bills payable	24,800.00
Accounts payable	2,108.28
	$36,908.28

190 Mr. Budge: This doesn't show the amount of property the Salmon Lumber Company had at the time the overdrafts were made at all. This inventory is dated the 13th day of June, 1911, after the close of the bank. It can't possibly go to the good faith of their making the loans in 1910.

Mr. Whitcomb: It is perfectly in harmony with the testimony which Mr. King and the others have——

The Court: Overruled. It has a tendency to show the value of the assets of this company, and the value of the assets would have some bearing upon the general question of the good faith of the bank in making the loans. Of course, if counsel for the plaintiff is right, that the making of an overdraft or permitting the making of an overdraft in itself constitutes actionable negligence, then this would be unimportant; but I understand you attempt to go further in the proof and show that, aside from that, it was negligence to make a loan to this company. In other words, if a loan had been made by way of a note, and no overdraft had been permitted at all, it would have been negligence to do so.

Mr. Budge: Yes.

The Court: Now this inventory, if correct, would tend to show that the company had considerable assets, and was solvent, and if it was solvent of course it would be quite a different thing from a case where it was insolvent.

Mr. Budge: But the offer was made, as I understood Mr. Whitcomb, to show that these overdrafts were allowed in good faith, while the inventory purports to show the condition in 1911.

191 So far as the evidence is concerned, we don't know that they had one foot of lumber in Salmon when these overdrafts were made. There isn't any evidence to that effect, so far as that inventory is concerned. That shows the condition after the bank closed altogether, so that they might have been utterly negligent in making the loans and allowing the overdrafts, when they were made, notwithstanding this inventory.

The Court: That may be true, Mr. Budge, but if they had these assets at this time, some sort of inference or conclusion would be drawn, no doubt, that they had assets of a similar value before that, or approximately that value, although they might have been in a different form, or that it had been a prosperous company.

Mr. Budge: I want to incorporate in my objection that it is incompetent, and hasn't been properly identified, and it isn't shown that this witness made the inventory, or was competent to make it.

The Court: The objection is overruled.

Mr. Budge: An exception.

Q. Mr. King, do you know the reason for the depression, as you have spoken of it, in Salmon, shortly before this bank failed?

A. It is a well known fact that the depression in all values of real estate fell soon after the advent of the railroad, and continued so to do up to the time of the closing of the bank. A great many building operations were suspended, and building that took place in 1910, I know from the fact that there were scores of

192 houses built in Salmon in 1910—the fact of it is that the bottom fell out of the community, in a sense, in that section of the country, and it has been very much depressed ever since. We naturally expected the railroad to go on down the river, from the fact that they bought thousands of dollars' worth of property on the other side of the river. They paid $15,000.00 to one man for a piece of property. Everyone expected, and the presumption was, that they were going down the river, and they gave it out that they were going down the river. They surveyed the route, and thousands of dollars were spent on that survey. I made the disbursements for the railroad company myself, through the bank, on that survey.

Cross-examination.

By Mr. Budge:

It is correct that none of the notes which have been introduced in evidence, and signed by the Pollards, the Salmon Lumber Company and by Brown were ever listed in the Directors' Discount Register. Even after the overdrafts were represented by notes which I had taken, they were not listed in the Directors' Discount Register. I may state in that connection that a renewal wouldn't be listed. None of these notes were listed. So far as the list of notes was concerned that was read to the directors at their meetings, I never at any time read these notes to the directors, to my knowledge, or informed them of the possession of these notes by me on behalf of

the bank. Mr. Andrews, the defendant, was drawing a salary from the bank at one time. I think he drew a salary for a year.

193 It was during the year 1910 that he drew his salary. In the month of July, at the meeting of July 6th, 1910, there were present, as shown by the directors' minutes, H. G. King, N. I. Andrews, George Buck, Fred Havemann and J. C. Sinclair and the following appears from the record: "The following report of the condition of the bank was read and adopted." That is the statement and the statement shows there an aggregate of overdrafts of $17,138.85. So that the directors, including Mr. Andrews, understood at that time that there were overdrafts in that amount and the overdrafts which were then outstanding that had been allowed to the Salmon Lumber Company and Brown and the Pollards on that date were known to the directors among the aggregate amount of overdrafts. They weren't itemized in the report to the board there. It was just a copy of the trial balance statement, spread on the minutes, and approved, but showing the aggregate amount of loans, and amount of cash on hand, and all that.

Q. The overdrafts which were then outstanding in favor of these companies, or which had been allowed to these companies, were included in this statement which had been approved.

A. If there had been any overdrafts against them in that particular month, yes is the answer.

Q. Well, as a matter of fact, when these notes were executed which have been referred to in the evidence?

A. Yes, at those dates it would show overdrafts, that is

194 correct. Plaintiff's Exhibits 12, 10, 27 and 9 were all for overdrafts.

Q. So that the notes, Plaintiff's Exhibit 27, and Plaintiff's Exhibit 9, would be shown in the statement of overdrafts approved at the July meeting?

A. During this month, that is, during the month that these minutes are dated, those overdrafts would appear in that aggregate.

Q. And in this meeting on July 6th to which your attention has been called?

A. Every month.

Q. Just answer the question.

A. Yes. These notes were included in that statement of overdrafts which was approved on the 6th day of July, in the aggregate. Part of it was the Salmon Lumber Company. On January 4th, 1911, Plaintiff's Exhibit 12 was executed and is included in the general total here of overdrafts, on January 10th, 1911, the aggregate of which is $28,657.91.

Q. And, without going into this matter more particularly, that is true as to all the other notes,—the Pollards and Brown, and the other Salmon Lumber Company notes, that wherever they were given for overdrafts they were included in the aggregate of overdrafts as shown by the statement approved by the board at the meeting next held after the overdraft was taken up by the note.

A. It would. The Salmon Lumber Company was a company

which members of my family were interested in. I had no interest in it myself.

195 Q. Did you loan any money to your daughters or to your son-in-law to go into this business?

A. I did. I loaned $2,500.00, or rather Mrs. King, of her own money, loaned my daughter Alice $2,500.00, and she put that into the lumber company. I loaned C. D. Slaughter an individual loan from the First National Bank of $2,500.00, the proceeds of which he put into the lumber company. C. D. Slaughter, I may say his note was liquidated——

Q. Never mind. Just what did you loan these parties?

A. That would be $5,000.00. We made them a present of $2,500.00, and then I loaned C. D. Slaughter $2,500.00.

Q. Was that all you loaned any of these individuals interested in the Salmon Lumber Company?

A. How do you mean—is that all I loaned them?—are you speaking to me as a banker or an individual?

Q. Of you as an individual.

A. I may have from time to time made them presents. I know I did at some times. I know I gave them money when they were married. I never loaned them money in their business. They had some money of their own, but I didn't loan them any more. C. D. Slaughter drafted the contract between the Salmon Lumber Company and Brown and the other mill owner, for the purpose of enabling the lumber company in which my family was interested to control the lumber market in that country. That was the object to be attained, to control the lumber industry in Salmon at that

196 time. It was not on that account that I carried this man Brown along and allowed him to overdraw. All these men had been doing business with me right along previously to that.

Q. Now you have stated that the loan for those notes for $7,500.00, taken over from the Langsdorf bank, signed by H. W. Soule and others, $15,000.00, you have stated that those were loans taken over from the Langsdorf Company?

A. They were.

Q. Isn't it true that they were renewed by you, those two notes?

A. We did. They couldn't pay them; I had to renew them. We renewed them for the same amount, just as they stood when we took them from Langsdorf, and the entries which are made in the loan and discount register of loans to Soule and others are the renewal notes and not the original notes which were taken from Langsdorf. Both notes were signed by N. I. Andrews, as well as by the Soules.

Q. And Andrews at that time was indebted to the bank in other amounts, was he not?

A. Mr. Andrews always carried a balance to his credit in the bank.

Q. I am not asking you that.

A. No, directly he was not indebted to the bank. The Andrews Light & Power Company was indebted to the bank, and he was a stockholder. That was a corporation. I don't *now* whether he owned more stock than Mr. Soule or Mr. Myers; I don't know how many shares of stock he owned. There were four of

197 them in the company. The other one was F. D. Havemann. I made trips to St. Anthony once or twice a year; perhaps sometimes I think I went—I know one year I was there twice, one year. I have a sister there. I have seen Mr. Bowerman on one or two occasions while there. I can't recall every instance that I saw Mr. Bowerman. Whenever I went to St. Anthony I naturally called on Mr. Bowerman.

Q. Were you up at St. Anthony during the fore part of 1910?

Mr. Millsaps: We would like to know what the object of this is, of this question.

The Court: Well, I think it is proper cross-examination.

Mr. Millsaps: We would like to know the purpose and raise an objection to it on the part of Mr. Bowerman. We have elected to stand on our motion to dismiss, and, as I understand it, that has eliminated him from any further consideration in this matter. Now, if the object of it is to prove anything as against Mr. Bowerman, we will object to it; if otherwise, we will not.

The Court: Perhaps that would depend on whether you claim any advantage by reason of the testimony that has gone in here through this witness, which would seem to be somewhat in your favor, namely, that when these notes and discounts were called to the attention of the board at their regular meetings, these particular notes in question were not listed, and hence not called to their attention.

198 Mr. Richards: We claim nothing, if the Court please, except to rest on the testimony as they introduced it in chief. We stopped right there, and are willing to rest our case on the case they made. There is no purpose to have any part of this, so far as Bowerman is concerned.

Mr. Millsaps: This morning we stated that we would stand upon our motion, and it was not our intention to introduce any more testimony. After that we had ourselves entered as associate attorneys——

The Court: I understand your position, Mr. Millsaps. It is unnecessary to restate it, and of course if you do not claim any benefit by reason of the testimony which has been offered or may be offered, I will have to sustain the objection.

Mr. Millsaps: Our contention not only is that we do not claim it, but our understanding is that we cannot claim any; that is the view we took of it.

The Court: The Court has ruled with you, Mr. Millsaps. Go on.

As to all the other loans which were read off by Mr. Biscoe above the sum of $6,500.00 the loans were straight loans, instead of taking up overdrafts such as the McKinney loan and others. I remember personally making the W. S. Hammond loans myself, and I know that one was Wellington and one was William.

Q. But you have dittoed the name, just the same?

A. I don't think it is in my handwriting. Yes, it is in my handwriting. That is my handwriting; I certainly did that.

199 I want to call your attention to the fact that the "Mrs." shows very plainly that it was written in there afterwards, because it was Mr. A. Eckersall, and that should have been Mrs., and ditto

was put in there at the time, naturally, when Mrs. Eckersall and Arch Eckersall——

Q. That book doesn't speak the truth in regard to that entry, does it?

A. Well, it does speak the truth—$3,000.00 and $6,000.00 to A. Eckersall, and then the top one here is Mrs., but, as I explained, the ditto is A. Eckersall, $6,000.00.

Q. It doesn't show that, does it?

A. That record doesn't. But this book does.

Mr. Andrews, the defendant, during the year 1910, was a member of the committee on loans and discounts. His duties, for which he was paid $100.00 a month, were to help the other members of the board there in passing upon loans that were made by the bank that were called to his attention, and on several occasions I would get Mr. Andrews to go out and look at the security for some of these loans, so that I could have the benefit of his judgment. He was in and about the bank considerably. Mr. Andrews didn't inspect the books, as he was no bookkeeper. He would have to have some little knowledge of bookkeeping, naturally, or he wouldn't know what he was inspecting. He had access to the books. I didn't inform him particularly, as vice-president and a member of the committee, of the general business of the bank. I talked over the loans with Mr. Andrews,
200 and discounts. I don't know about the overdrafts. Overdrafts were varying all the time, and there was no specific reason that we consulted. Sometimes a man would have an overdraft one day, and would have money on hand the next. They fluctuated so rapidly that I wouldn't know of any particular case where he was called upon to—where I was called upon to inform him or any of the others. Mr. Lottridge and I were the two active officers of the bank and conducting that part of it, and paying the checks over the counter; nobody else waited over the counter but us, and that is the only way an overdraft could be gotten. I don't know that I ever talked with Mr. Andrews about permitting an overdraft to be increased.

Q. Did Mr. Andrews discuss with you the overdrafts of $17,000.00 or more? Did you and Mr. Andrews discuss that in July, 1910?

A. The discussion would only be in this way, that we would make a remark that the overdrafts in general had gone up so much this month, or that they had increased so much this month. I can't call any time to mind that Mr. Andrews asked me who was being permitted to overdraw or asked me specifically about the overdrafts. I don't recall him ever making any inquiry or indicating any interest in the increase of overdrafts. The overdrafts on July 6th 1910, are shown to have been $17,000.00 and some excess. On August 6th, 1910, the overdrafts show $18,000.00, an increase of $6,000.00. In December, 1910, the overdrafts were $23,805.00. January
201 10th, 1911, $28,657.00. There never was any discussion between Mr. Andrews and myself with regard to the overdrafts, to my knowledge. No one of the board of directors ever made any inquiry with respect to that.

The Western Building & Loan took a mortgage on the property

Pollard erected there with the brick. I certainly didn't intend to testify that I took a mortgage upon this property myself. The facts were that Mr. Pollard erected a brick building—I don't know who took the mortgage. I don't think it was I, and I don't think it was taken until after the bank failed. I believe it was taken by Mr. Yeager.

Redirect examination.

By Mr. Whitcomb:

Q. Turn to page 139 of the minutes of your meetings, the meetings of your corporation. At the left hand side, on page 139, I see some initials, "C. S. L.," "11-19-09." What do they indicate, if you know?

A. They are the initials of C. S. Loveland, the bank examiner, at the time he examined the bank, and happened to examine the records of the minutes of the meeting.

On page 178 I find the initial of Mr. Loveland, the bank examiner, and on page 184 the initials of C. S. Loveland; on page 187 the initials of Harry Yeager, the other examiner, and the same on page 191. Always the minutes of the bank have been examined from time to time by the different bank examiners that came to Salmon. No criticism was ever offered. Mr. Loveland complimented Sinclair on the way the records of the bank were
202 kept. He was the secretary. He never made any objection to me of the showing made on any of these pages. The stockholders of the bank during this period were myself and Mr. Bowerman and Mr. Andrews and Mr. Buck and Mr. Havemann, Mr. Lottridge and Judge Olden. Judge Olden had $1,000.00 worth of stock. Guy E. Bowerman had $10,000.00 worth of stock. Mr. Andrews had $6,600.00 worth of stock. George Buck had three thousand and some odd. Fred Havemann had $1,000.00. John Lottridge had $1,000.00. And I had $14,000.00. And Sinclair, who is now deceased, $9,600.00.

The Court: I want to ask you how these overdrafts were reported to the board. Your attention has been called to an entry or entries in one of the books here, in which reference is made to the total amount of overdrafts existing at that time, or during the preceding month. How was that fact reported to the board, and what was the basis of this minute entry?

A. Taken from the trial balance statement.

The Court: I say, how was it reported? How did they come before the board?

A. It would come by the secretary of the board reading over the trial balance statement as it is spread on the minutes. It would come before the board just as it is spread on the minutes there.

The Court: You mean a memorandum in writing would be presented to the board, and that would be copied on the minutes, just as it appears here?

A. Yes, it would be copied just as it appears here.

The Court: How did it come that you permitted over-

203 drafts, when the by-laws seem to prohibit overdrafts?

A. It has always been customary in all national banks to permit overdrafts, Your Honor, and I have been in the banking business for quite a long time, and I never knew of a bank in the United States that did not permit overdrafts, and I think that by referring to any statement of any of the largest and most important banks in the United States you can hardly find one where overdrafts are not part of the assets of the institution.

The Court: That may be true, but how do you explain the existence of this by-law, and also the practice of permitting overdrafts?

A. That by-law was simply a copy of the by-laws of some other national bank, Your Honor, which is customary for nearly all national banks to have. It really wasn't made from our own initiative. It was simply a copy of some other bank's by-laws, and was passed in that way.

The Court: Was the matter never discussed at your board meetings, when these overdrafts were reported, that the permitting of overdrafts was in violation of the by-laws?

A. Not at all, Your Honor. The only way they were discussed was to make a remark that the overdrafts have gone down this month. We tried to keep them down as much as possible, but anyone in the banking business can verify the statement that it is the hardest thing in the world for a banker to keep down his overdrafts. They will crop in. When a check comes in you
204 have either got to throw it out or pay it, and it would work a detriment to the party, and it would injure your own business, if you throw them out, and you feel at the time that there is no question but what they will be paid in the future; and we were in the habit of letting people overdraw their accounts, sometimes, when they were starting out to buy a bunch of cattle, maybe, not knowing how much they would want.

The Court: What I want to ask you more particularly is about these three or four accounts, the more important ones, the Pollard matter, and the Salmon Lumber Company, and the Brown matter. I think you explained that these notes were given to take up accumulated overdrafts from time to time?

A. Yes, Your Honor.

Q. Were these overdrafts permitted without a previous arrangement, or in accordance with a previous arrangement?

A. Just between myself and the parties. I told them that if they would just draw their checks on us I would honor them.

Q. That was done before they drew the checks, or afterwards?

A. Done before they drew the checks; but I never anticipated that the thing would reach the proportions that it eventually did. But I got hold of it, and I sort of had to hold it up, but it got so large—I wasn't anticipating to advance them this money and let them draw on us for it. They couldn't tell how much lumber was coming in, and they couldn't tell how much money they
205 would want to use. I let them draw on the bank, and at the end of the month they would come in and cover it with a

note, and I gave them the privilege of overdrawing their account, and that is customary in a great many banks.

The Court: I think that is all. Do you desire to ask any more questions, either side?

Mr. Budge: No, Your Honor. I desire to submit these four pages.

The Court: Have you submitted them to counsel?

Mr. Budge: Yes.

Mr. Richards: We would like to have them considered denied, so as to make the issue.

The Court: Very well.

An adjournment was thereupon taken until 1:30 P. M.

Defendants' Exhibit No. 2 was here offered and received in evidence. By order of Court, permission was granted for the withdrawal of plaintiff's Exhibit 26, which is an exact copy of plaintiff's Exhibit 25, save and except that plaintiff's exhibit 26 is signed by C. D. Slaughter and A. K. Carl. The defendants rested, there was no rebuttal and the testimony was closed.

Plaintiff tenders the foregoing and prays that it be allowed as a statement of evidence under equity rule 75.

Dated this 26th day of October, 1915.

J. M. STEVENS,
JESSE R. S. BUDGE,
CARL BARNARD,
Attorneys for Plaintiff.

206 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. McCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Haveman, John Lottridge and E. S. Edwards, Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

Before Gilbert, Ross and Hunt, Circuit Judges.

(Opinion U. S. Circuit Court of Appeals.)

HUNT, *Judge:*

This suit was brought by McCormick, as Receiver of the First National Bank of Salmon, Idaho, against defendants King, Andrews,

Buck, Bowerman, Haveman, Lottridge and Edwards to obtain an accounting of the affairs of the bank and to determine the liability of the respective defendants, and for judgment against the defendants respectively according to their respective liabilities, and to recover money alleged to have been negligently wasted and lost and illegally received by the directors and for general relief. After trial to the Court decree was entered against the defendants King and Andrews and in favor of the defendants Bowerman and Edwards, and was dismissed for lack of service upon defendants, Buck Haver-
207 man and Lottridge. McCormick as Receiver appeals.

The bank, which had done a general banking business from January 1906 to June 1911, suspended business on June 8th, 1911, and in August 1911 was put into the hands of a Receiver. The original capital of the bank was twenty-five thousand dollars divided into two hundred and fifty shares of one hundred dollars each, but about February 1910 the capital stock was increased to fifty thousand dollars divided into five hundred shares of the face value of one hundred dollars each. In January 1912, after suspension, the Comptroller of the Currency assessed the stockholders to the full face value of the shares of stock of the shareholders respectively, amounting to fifty thousand dollars, of which amount twenty thousand dollars was paid to the Receiver, but owning to the insolvency of a number of the shareholders the Receiver will be unable to collect approximately twenty thousand dollars of the assessment, and after realizing on the assets of the bank there will be a deficiency of approximately twenty thousand dollars of unpaid obligations. The defendants King, Andrews and Bowerman were members of the Board of Directors at the time of the organization of the Bank and continued to be directors until the Receiver took charge. King was President, except during the year 1908 when he was Cashier and General Manager; Andrews was Vice-President from January 1908. Buck and Lottridge (not served) were directors from and after November 17th, 1909, and up to the suspension of the bank, Lottridge having been acting Cashier from January 1st, 1910 until June 8th, 1911. Havemann was a director and Assistant Cashier from January 18th, 1910 until the failure of the bank; Edwards was a director from May 15th, 1906 until January 18th, 1910.

208 The complaint is that the defendants as directors knowingly permitted the making of loans by the officers of the bank in excess of the limit provided by section 5200 of the Revised Statutes of the United States whereby large sums were lost to the bank, and that they mismanaged the affairs of the bank and negligently permitted over-drafts whereby loss to the bank will accrue. The answering defendants denied any liability.

The Receiver assigns as error the adjudication that the defendants King and Andrews are liable in the sum of only $14,700.00, that sum being the liability measured by Sections 5147, 5200 and 5239 of the Revised Statutes of the United States and not by the common law; also the action of the Court in dismissing the complaint as against Bowerman whom the Court found to be not guilty of such neglect of duty as a director of the bank as to render him liable either under the

sections of the United States Statutes heretofore quoted or at common law.

For convenience we quote, so far as material, Sections 5147, 5200 and 5239.

"Section 5147. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, etc."

"Section 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liability of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed."

"Section 5239. If the directors of any national banking as-
209 sociation shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this Title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders or any other person, shall have sustained in consequence of such violation."

The by-laws of the Bank adopted October 9th, 1906, contained among other things provisions requiring the directors to hold regular meetings on the first Tuesday of each month and special meetings as the President, Cashier or any three or more members might require. There was a provision for a loans committee consisting of the President, one Director and the Cashier with power to make loans, discount bills, buy and sell bills of exchange, and whose duty it was to report at each regular meeting of the directors concerning all bills and other evidences of debt discounted and purchased by them for the bank since their last previous report.

Section 19 of the by-laws forbade any officer or clerk to pay any check drawn, or to pay out money on any order unless the drawer of such check or order at the time of the presentation thereof had money on deposit sufficient to meet such check or order. Section 29 provided for the appointment by the Board of Directors of a committee of three members to examine each month the affairs of the bank, compare its assets and liabilities with the accounts of the general ledger, ascertain if the accounts are correctly kept, the condition of the bank whether in sound and solvent condition and to

recommend to the Board such changes in the method of doing business as might seem desirable, the result to be reported to the
210 Board at its next regular meeting. Thereafter on January 18th, 1910, the by-laws were amended so as to require the Board of Directors at each monthly meeting of officers to examine and approve all loans and discounts and provided that such approval should be kept in a book for that purpose. King and Andrews were present at the meeting.

Three matters became important uopn the trial and are specially dwelt upon in the briefs of counsel. The Salmon Lumber Company was a corporation the controlling interest in which was owned by the relatives of defendant King. Commencing back in 1910 it had borrowed money from the bank at various times and was permitted to overdraw its account in large sums. The amounts of the overdrafts were put into notes and when the Bank suspended the Lumber Company owed notes to the Bank for about $13,629.20 and accrued interest amounting to $5,408.62 at the time of the trial of this suit in 1915.

The District Court found that the loss on these loans would be $7,000.00. Loans to Harry Brown amounted to $11,760.25 and $5,234.81 interest. Brown was an old customer of the Bank and like the Salmon Lumber Company was in the habit of making over drafts, to cover which, notes were taken in January 1911. Brown was a lumber merchant and co-operated with the Salmon Lumber Company and others in trying to control the lumber business in the Salmon section of Idaho. After suspension of the Bank the Receiver brought action and obtained judgment against Brown for $18,498.39 due to the Bank, but execution upon the judgment was returned unsatisfied. The District Court found that the loss upon the debt of Brown would be $11,760.00.

There were loans to F. M. and S. A. Pollard evidenced by two notes, one for $6,250, dated June 29th, 1910, the other for $1,700.00 dated July 11th, 1910. The interest on the notes aggregated $3,626.42. The Receiver recovered judgment but only $150
211 realized on execution. The District Court found that the loss on account of these notes was $7,800. The total amount of the losses as found by the District Court aggregates $26,374.85 exclusive of interest and some costs. With interest the amounts are brought up to $40,644.70 as of the date of the trial. There were also losses of about $3,900 from overdrafts by different persons, but the District Court took no account of them and we shall not.

King and Andrews were present at nearly all the Board meetings, and in 1910 Andrews was paid a salary for aiding the board in passing upon loans. They both knew of the large amount of overdrafts which in the last half of December 1910 had increased to $23,805.63 and on January 10th, 1911 exceeded $28,657.91, although at the time the bank suspended the overdrafts were $9,800. The two were active in managing the affairs of the Bank, were on the committees of loans and discounts and of course were fully aware of the by-laws (Section 19) which forbid overdrafts. King said

in effect, that all his actions had been in good faith; that the Salmon Lumber Company did a large business, had assets and seemed prosperous; that from time to time it made overdrafts but that notes were given to cover such overdrafts, and that in this way the notes standing when the bank failed were contracted. Concerning the Brown loans he said that Brown would often overdraw his account by giving checks to pay his men and would later give notes to cover the amounts overdrawn as they had accumulated; that Brown was doing a good business, had a large contract and he believed was making a profit and could meet his obligations. With respect to the Pollard loan he said that one note for $6,250 was the accumulation of prior notes and the $1,700.00 note was to cover overdrafts; that he took the notes of Mr. and Mrs. Pollard because Pollard had
a building contract and a brick yard and agreed to reduce
212 his debt as brick were sold, but that, because of general depression, the sale of brick became less, realty values depreciated; that Pollard had to place a mortgage upon his property and that the bank could only secure a second mortgage under which, after foreclosure of the first mortgage the bank lost by the transaction. Witness said he knew Mrs. Pollard owned considerable land and though- that she was solvent and good for the money loaned to her and her husband. When his attention was called to the fact that there were no entries of these several loans on the discount register (a book required to be kept by order of the Comptroller of the Currency) King said that as the notes were given to cover overdrafts and not direct loans he did not treat them as "specific loans"; that he did not confer with the Board of Directors about these loans in the matter of overdrafts, but that on July 6th, 1910 at a directors' meeting a statement showed an aggregate of $17,138.85 as overdrafts, and that while no items were made the loans above referred to were included. When he was asked by the Court to explain the allowing of overdrafts in the face of the bylaw prohibiting them, King said that overdrafts were customary in all national banks; that the bylaw forbidding them was simply a copy of the bylaw of some other bank; that at the directors' meetings there was no discussion of overdrafts being in violation of law; that he tried to keep them down but that they would "crop in." We quote from the record:

"When a check comes in you have either got to throw it out or pay it, and it would work a detriment to the party, and it would injure your own business, if you throw them out, and you feel at the time that there is no question but what they will be paid in the future; and we were in the habit of letting people overdraw their accounts, sometimes, when they were starting out to buy a bunch of cattle, maybe, not knowing how much they would want.

The Court: What I want to ask you more particularly is about these three or four accounts, the more important ones, the Pollard
matter, and the Salmon Lumber Company, and the Brown
213 matter. I think that you explained that these notes were given to take up accumulated overdrafts from time to time.

A. Yes, Your Honor.

Q. Were these overdrafts permitted without a previous arrangement, or in accordance with a previous arrangement?

A. Just between myself and the parties. I told them that if they would draw their checks on us I would honor them.

Q. That was done before they drew the checks, or afterwards?

A. Done before they drew the checks; but I never anticipated that the thing would reach the proportions that it eventually did. But I got hold of it, and I sort of had to hold it up, but it got so large—I wasn't anticipating to advance them this money and let them draw on us for it. They couldn't tell how much lumber was coming in, and they couldn't tell how much money they would want to use. I let them draw on the bank and at the end of the month they would come in and cover it with a note, and I gave them the privilege of overdrawing their account, and that is customary in a great many banks."

Defendant Bowerman's position is quite different from that of King and Andrews. As already stated Bowerman was a director from the organization of the bank in 1906 until the Receiver took charge, but he had no executive position in the bank, never attended a meeting of the board of directors and in fact never personally assumed any authority or control over the officers of the bank. He did nothing whatever in connection with the bank or its affairs. He was a business man who lived at St. Anthony, Idaho, two hundred miles distant from Salmon where the bank was situated, and the evidence is that it would have been more or less inconvenient for him to make the trip necessary to go to Salmon to attend directors' meetings. Evidently he had confidence in those who directly managed the affairs of the bank and never gave personal concern to his directorship or its attendant obligations.

Appellee would have us regard the action as restricted to one for the violation of the particular statutes heretofore quoted; but we think the complaint must be looked upon as broad enough to charge liability not only for violation of the terms of the statutes quoted,

but of the common law duty to be honest and diligent. For
214 example, after averring that the defendants King, Andrews,

Bowerman and others, knowingly permitted and assented to the making of the loans to the Salmon Lumber Company, Brown and the Pollards which were in excess of the limit provided by Section 5200, the complaint alleges that King, Andrews and other directors at the meetings of the Board each month between January 18th, 1910 and March 1911 personally passed upon and knowingly approved each monthly statement of excessive loans which had been made through the President, Andrews and the cashier charged with the management and the conduct of the affairs of the bank, and wilfully, negligently and knowingly permitted King and Lottridge to make the loans to Brown and to the Pollards whereby the funds of the bank were lost; that the monies as aforesaid loaned to persons or associations who had no sufficient assets or security to give were negligently loaned and that defendants negligently permitted overdrafts to certain persons. It is averred

too that Bowerman notwithstanding his oath as a director that he would diligently and honestly manage the affairs of the bank, and would not willingly permit any violations of law in the conduct of the bank, carelessly, wilfully and negligently failed to attend any meetings of the Board of Directors during the entire time of his directorship, and wilfully, carelessly and negligently failed during the entire time of his directorship to discharge the duties and obligations as a member of the Board of Directors in examining into and keeping well informed concerning its affairs and particularly the loans made by the Bank, and wilfully and negligently failed to exercise proper or any supervision as a director of the
215 affairs of the bank, but that on the contrary during the time the affairs of the bank were being "grossly mismanaged" with knowledge from the published statements of the Bank, required to be furnished by the Comptroller of the Currency and from other sources that the affairs of the Bank were being grossly mismanaged and that excessive and illegal loans were being made, negligently and wilfully permitted King and Lottridge to make such loans and particularly the loans to the Salmon Lumber Company, to the Pollards and to Brown.

The proofs showed the frequent allowance of large overdrafts to the three borrowers heretofore specially referred to, and that at times the respective amounts owing by such persons respectively exceeded one-tenth the amount of the capital stock of the bank. It is no defense in an action of this character for the officers who were in direct charge of the affairs of the institution that the by-law which forbade the payment of checks unless the drawer had funds on deposit sufficient to meet such check, was copied from the by-laws of other banks and that notwithstanding such by-laws other banks also often allow overdrafts. In the first place we are unwilling to accept the general statement of Mr. King, the President, as correct. No other banker was called upon to testify to such a custom and we are disposed to look upon the testimony as but an effort of one over-zealous to help excuse himself for his own conduct in the premises and whose excuse is incompatible with the presumption that bank officials well and truly exercise their duties and keep within the limitations of the by-laws which have been regularly adopted. In the next place, even if it were true to an extent, such a practice would be no authority for bank officials to allow customers to overdraw in sums and incur liability in excess of one-tenth of the amount of the capital stock of the bank
216 paid in. For months before this bank failed the frequent payment of large overdrafts must have made it apparent to the loan and discount committee of the bank that if such acts of the officers were continued it would mean a sacrifice of the interests of the stockholders. But the president and vice-president and cashier went on in the practice of departure from duty and suspension followed. We can therefore reach no conclusion other than that the acts referred to were not mere errors of judgment but were in gross mismanagement of the bank, for which the defendants

King and Andrews are liable under the general principles of the common law, as well as under the statutes heretofore quoted.

The statutory liability of directors of national banks as provided in Section 5239 is undoubtedly the exclusive rule by which to measure the right to recover damages from directors based upon a loss alleged to have resulted solely from violation by such directors of a duty expressly imposed upon them by a provision of the National Bank Act. This was directly decided in Yates vs. Jones National Bank, 206 U. S. 158, and is approvingly referred to in Thomas vs. Taylor, 224 U. S. 73. But in the former case the Supreme Court was very careful not to announce any rule whereby the law will relieve directors who are the active officers of the bank and who knowingly and deliberately and repeatedly commit acts of such negligent management that the result has forced the bank into liquidation. In the case cited, supra, the Court said:

"That the words "shall knowingly violate, or knowingly permit," etc., found in the first sentence of section 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the Title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or will-
217 fully permit to be violated, any of the provisions of this Title." Mark the contrast between the general common law duty to "diligently and honestly administer the affairs of the association" and the distinct emphasis embodied in the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this title." In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of Civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title."

It is to be remembered that the case in which this language was used was one involving the civil liability of directors in respect to the making and publishing of the official reports of the condition of the bank, duties solely enjoined by the statute of the United States. The Court took pains to use this language:

"Of course in what has been said we have confined ourselves to the precise question arising for decision, and therefore must not be understood as expressing an opinion as to whether and to what extent directors of national banks may be civilly liable by the principles of the common law for purely voluntary statements made to individuals or the public, embodying false representations as to the financial condition of the bank, by which one who has rightfully relied upon such representation has been damaged. And because

we have applied in this case to the duty expressly imposed by the statute the standard of conduct established therein we must not be considered as expressing an opinion upon the correctness of the views enunciated by the court below concerning the standard which should be applied solely under the principles of the common law, to fix the civil liabilities of directors in an action of deceit. See Briggs v. Spaulding, 141 U. S. 132."

Until within more recent years men not unfrequently were found in positions similar to Bowerman's. He seems to have been a man of affairs and standing in the community and in the best of faith accepted a directorship in the Salmon Bank and after his election was content to trust entirely to the officers of the bank and did nothing himself in the performance of any duty incident to his directorship. Mr. Bowerman failed to keep himself advised of even general conditions and was not even sufficiently actively
218 interested to make inquiry of any kind about the affairs of the bank until it was found that those immediately in charge, had, through gross mismanagement brought the bank to failure, and that as a result the directors would be called upon to answer for losses. Let it be conceded that the inattention of a director situated as was Bowerman, has been brought about without any evil intention on his part, and that it may therefore work some hardship to hold him liable for the losses due directly to the positive negligence of the President and loan committee. But there is the other and wider view to be taken, that by which the law must always guard the interests of the institution and those of the public who were attracted to it; the interest of persons who have given their monies to the custody of the bank, relying upon the belief that the directors being men of integrity and business capacity would at least make some effort to see that those in charge of the affairs of the institution would keep within the statutes and the by-laws which control. In the application of this wholesome doctrine one who fails to make any effort to have the bank properly administered acts wrongfully and becomes liable for non-action. Chesborough vs. Woodruff, 195 Fed. 875.

The fact that Mr. Bowerman lived two hundred miles away is not an excuse for him. He lived that distance from Salmon when he voluntarily accepted the directorship, and to exonerate him from neglecting to attend a meeting of the board or inquiring into the conduct of the institution would be practically to hold that there was no meaning and significance whatever to the oath he took that he would, so far as the duty devolved upon him, honestly and diligently administer the affairs of the association. No one would contend that a director must look into details of management or keep closely in touch with routing matters or know intimately to
219 whom credits are given; but he is responsible for the exercise of supervisory control and must be held to know something of the more important concerns of the association, and his duty in these respects is not lessened by the fact that to do his duty means some personal inconvenience. 7 C. J. 788, 789. If continued omis-

sion to give any attention could excuse, then the greater the inattention of a director to his duties the less the liability he would incur.

The Supreme Court in Briggs vs. Spaulding, 141 U. S. 132 said: "Without reviewing the various decisions on the subject we hold that directors must exercise ordinary care and prudence in the administration of the affairs of the bank, and that this includes something more than officiating as figure heads. They are entitled to commit much of the actual banking business to the cashier, president and other officers," but says, * * * this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrongdoing if that ignorance is the result of gross inattention."

If the evidence showed any effort or attention on the part of Mr. Bowerman his appeal might find some foundation of merit, but as we scrutinize his course it cannot be squared with any standard of ordinary care or reasonable diligence. Michie on Banks and Banking, Vol. I, sec. 53; Morawitz on Private Corporations, Sec. 554; Rankin vs. Cooper, 149 Fed. 1010.

In Gibbons vs. Anderson, 80 Fed. 345, Judge Severens well said: "What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence or depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitation for business, would only select a cashier, and surrender the management to him? It is safe to say that such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests would be committed to one man, without oversight and control."

Our best judgment is, that the liability of defendants King and Andrews being for gross mismanagement should have been measured in accordance with the rule of the common law rather than solely according to the statute. It follows that there should not have been credited against the sums due by the Salmon Lumber Company, the Pollards and Brown, respectively, the $6,500 (tenth part of the capital stock paid in) deducted in each instance by the District Court. The Court disallowed all interest prior to the entry of the decree. In this respect we are also in disagreement with the decree, for we think that interest should have been included, to be calculated from the respective dates of the notes given by the Salmon Lumber Company, the Pollards and Brown respectively. For any sums paid upon any of the notes since the dates thereof and for any other sums collected credits with interest thereon should be allowed.

With respect to defendant Bowerman our opinion is that his liability is also to be measured primarily by the rules of the general

law and that his want of knowledge of the gross mismanagement of King and Andrews was due to such inattention to the duty which was imposed upon him of exercising a reasonable supervision over the conduct of those in charge of the bank, that he too is liable to the same extent as are King and Andrews and that decree should accordingly go against him. Allen vs. Luke, 163 Fed. 1018; Williams vs. Brady, 221 Fed. 718; 232 Fed. 740.

Inasmuch as there may have been some change in the amounts collected which were due apparently when the decree was entered, the decree of the District Court is reversed and the cause is
221 remanded with directions to the District Court to make ascertainment through the aid of a master if deemed preferable, of the amounts due upon the Pollard, Salmon Lumber Company and Brown loans as will accord with the views herein expressed, and that thereafter suitable decree be entered against defendants King, Andrews and Bowerman.

Reversed and remanded.

[Endorsed:] Opinion. Filed April 9, 1917. F. D. Monckton, Clerk.

222 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Decree.

Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Idaho, Eastern Division, and was duly submitted:

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, reversed, with costs in favor of the appellant and against the appellees, and that this cause be, and hereby is remanded with directions to the said District Court to make ascertainment through the aid of a master if deemed preferable, of the amounts due upon the Pollard, Salmon Lumber Company and Brown loans as will accord with the views expressed in the opinion of this Court, and that thereafter suitable decree be entered against defendants King, Andrews and Bowerman.

It is further ordered, adjudged and decreed by this Court, that the appellant recover against the appellees for his costs herein expended, and have execution therefor.

[Endorsed:] Decree. Filed and Entered April 9, 1917. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk.

223 United States Circuit Court of Appeals for the Ninth Circuit.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Notice to Join in Appeal.

To Harry G. King, Norman I. Andrews, and E. S. Edwards, parties to the above entitled cause, and E. W. Whitcomb and J. B. Eldridge, their attorneys:

You and each of you are hereby notified that the undersigned, on or shortly after the 25th day of June, 1917, will apply to the above entitled Court, or to a Judge thereof, for the allowance of an appeal to review the final judgment and decree of said Court herein, and the undersigned hereby demands and requests that you and each of you join with him in said application for appeal on or before said 25th day of June, 1917, and if you fail or refuse to join in said appeal by said date you are further notified that you and each of you will be deemed to have acquiesced in said judgment and decree, and the undersigned will prosecute his said appeal as to his own interests and without your assistance, and will apply to said Court for an order for severance as to your interests and each of them.

Dated this the 12th day of June, 1917.

GUY E. BOWERMAN,
By RICHARDS & HAGA,
His Attorneys.

Residence: Boise, Idaho.

224 Service of the foregoing notice and receipt of a copy thereof is hereby admitted this the 18th day of June, 1917.

E. W. WHITCOMB,
Residence: Salmon, Idaho;
J. B. ELDRIDGE,
Residence: Boise, Idaho, Attorneys for Harry G. King, Norman I. Andrews, and E. S. Edwards.

225 UNITED STATES OF AMERICA,
State of Idaho, County of Ada, ss:

J. H. Richards, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the above named appellee Guy E. Bowerman; that on or about the 12th day of July, 1917, in the city of Boise, State of Idaho, and after service of the foregoing notice to join in appeal, he was informed by E. W. Whitcomb, one of the attorneys for said appellees Harry G. King, Norman I. Andrews and E. S. Edwards, that the said last mentioned appellees would not, nor would either of them, join with the said appellee Guy E. Bowerman in appealing or prosecuting an appeal to the Supreme Court of the United States from that certain judgment and decree entered by the above entitled court in the above entitled cause against said appellees, and each of them; and that at said time and place this affiant informed the said E. W. Whitcomb that the said Guy E. Bowerman would apply to the above entitled court for an order severing his interest on appeal from the interests of the said Harry G. King, Norman I. Andrews and E. S. Edwards, and each of them; and the said E. W. Whitcomb then and there informed this affiant that no objection would be made by said Harry G. King, Norman I. Andrews and E. S. Edwards, or either of them, to such application for severance.

J. H. RICHARDS.

Subscribed and sworn to before me this 19th day of July, 1917.
[SEAL.] ALTA I. KNAPP,
Notary Public for the State of Idaho.

Residing at Boise, Idaho.

[Endorsed:] Notice to Join in Appeal to Supreme Court U. S. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

226 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Assignment of Errors.

Now comes Guy E. Bowerman, one of the appellees in the above entitled cause, in connection with his appeal to the Supreme Court of the United States from the decision and decree of the above entitled

Court, rendered in said cause on the 9th day of April, 1917, the petition for the rehearing of which was denied on the 4th day of June, 1917, and presents and files his assignment of errors and says that said decree rendered as aforesaid is erroneous and unjust to this appellee, and particularly in this:

I.

Because the Circuit Court of Appeals erred in reversing the decree of the District Court, when there is no evidence that appellee Bowerman knowingly violated, or knowingly permitted to be violated, any of the provisions of the National Banking Act, or even had knowledge that the provisions of such Act were being violated until after such violations had taken place.

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II.

Because there is no evidence to show that appellee Bowerman was a Director of the First National Bank of Salmon during the period that the alleged mismanagement took place from which loss resulted, while the pleadings raise the issue that he was not a Director at such time.

III.

Because the record shows this case was tried in the District Court on the theory that appellee Bowerman had knowingly violated or permitted to be violated the provisions of the National Banking Act, and there is not one scintilla of evidence that Appellee Bowerman participated in or assented to any alleged violation of such Act, while the decree of the District Court was reversed on the theory that appellee Bowerman was liable under the rules of the common law.

IV.

Because the Circuit Court of Appeals, having held that the appellant had made a case against appellee Bowerman, erred in not remanding the cause for a new trial to permit appellee Bowerman to introduce evidence in support of his affirmative defense that he had resigned as a Director of the Bank before the alleged mismanagement took place, and was not a Director at such time.

V.

Because the action was tried on the theory of a statutory liability, while the Circuit Court of Appeals reversed the decree of the District Court on the theory that appellee Bowerman was liable for the alleged violation of his common law duty, while there is no evidence that the loss was the result of his alleged failure to attend meetings of the Board of Directors, but the evidence on the contrary shows that

for the most part had he attended such Board meeting he
228 would not have discovered or had knowledge of the loans from which the loss resulted.

VI.

Because a party is not permitted to try his case on one theory and on an adverse decree appeal and ask for a reversal of such decree on another theory, as was done in this case, the record clearly showing that the question of a common law liability was raised for the first time on appeal and that the decree of the District Court was reversed upon the theory of a common law liability.

VII.

Because there being issues made by the pleadings upon which there was no evidence or findings and the case being undeveloped, a new trial should have been granted.

VIII.

Because this appellee has had no oportunity to be heard upon the question of his alleged common law liability, the case having been tried in the District Court on the theory of a statutory liability only.

IX.

Because the Circuit Court of Appeals directed judgment to be entered against appellee Guy E. Bowerman on a common law liability, when it should have remanded the case with instructions to grant a new trial and give appellee Bowerman an opportunity to present his defense to any liability under the common law.

X.

Because no evidence was introduced by appellant even tending to show that the failure of appellee Bowerman to attend the meetings of the Board of Directors was the cause of any part of the alleged loss, or that had he attended such meetings such loss, or any part thereof, would have been avoided.

229 XI.

Because the decision of the Circuit Court of Appeals and the decree which it directs to be entered will deprive appellee Guy E. Bowerman of his property without due process of law, and deprive him of his rights under the Constitution and laws of the United States, and particularly under the Fifth Amendment to said Constitution.

XII.

Because the Circuit Court of Appeals erred in holding that the Bill of Complaint was broad enough to charge a violation of a com-

mon law duty on the part of appellee Bowerman and in holding that there was any liability on the part of Appellee Bowerman under the rules of the common law for his alleged negligence, since Section 5239 of the Revised Statutes of the United States fixes the liability of Directors of National Banks and precludes a common law liability.

XIII.

Because the Circuit Court of Appeals erred in reversing the decree of the District Court dismissing the Bill of Complaint as to Appellee Guy E. Bowerman.

XIV.

Because the Circuit Court of Appeals erred in not allowing a credit of $6,500.00 (a tenth part of the capital and surplus of the First National Bank of Salmon) on each of the three loans,—the Salmon Lumber Company, the Brown and Pollard loans, as the evidence shows there was no negligence on the part of the Directors of the First National Bank of Salmon in lending to these parties the amount permitted by law.

XV.

Because the Circuit Court of Appeals erred in directing the District Court to enter a decree against appellee Bowerman for interest on the full amount of the loans, or any part thereof, to the
230 Salmon Lumber Company, Brown, and the Pollards, prior to the commencement of the action in the District Court.

XVI.

Because the Circuit Court of Appeals erred in reversing the decree of the District Court and in directing a decree for the full amount remaining unpaid on the Salmon Lumber Company, Pollard, and Brown loans, together with interest thereon, to be entered against Appellee Guy E. Bowerman.

Wherefore, Appellee Bowerman prays that the decree of the Circuit Court of Appeals be reversed and the decree of the District Court affirmed, and, in the event it should be held that the Bill states a cause of action under the common law against appellee Bowerman, that the cause be then remanded with directions to grant a new trial, to the end that said appellee may have an opportunity to introduce evidence in support of his defense that he was not a director of the Bank at the time of the alleged irregularities in its management and that he did not fail to properly discharge his duties before he resigned as director.

JAMES H. RICHARDS,
OLIVER O. HAGA,
MARVIN C. HIX,
Solicitors for Appellee Guy E. Bowerman.

Residence: Boise, Idaho.

[Endorsed:] Assignment of Errors on Appeal to Supreme Court U. S. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

231 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Petition for Appeal.

Guy E. Bowerman, one of the above named appellees, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that a judgment was therein rendered on the 9th day of April, 1917, reversing the decree of the District Court of the United States for the District of Idaho, Eastern Division, and that a petition for rehearing was thereafter filed within the time required by the rules of the Court, which petition was denied by said court on the 4th day of June, 1917; that the matter in controversy in said suit exceeds One Thousand Dollars ($1,000.00), to-wit: over Forty Thousand Dollars ($40,000), besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Ninth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal, for the reasons specified in the Assignment of Errors which is filed herewith.

Petitioner further says that the appellees Harry G. King, Norman I. Andrews and E. S. Edwards, and each of them,
232 have refused to join in this appeal after being duly notified in writing by your petitioner to join in an appeal to the Supreme Court of the United States to reverse or modify said decree and judgment, or sever their interests from the interests of your petitioner on such appeal. And your petitioner further shows that George Buck, Fred G. Havemann and John Lottridge, defendants in said cause in the District Court, were not served with process in said cause and did not appear therein, and the Bill was by said plaintiff and appellant dismissed as against the said George Buck, Fred G. Havemann and John Lottridge.

And your petitioner conceiving himself aggrieved by the decree so made and entered in this court in said cause, does hereby appeal from said judgment and decree to the Supreme Court of the United States, and he prays that this appeal may be allowed and that a transcript of the record and proceedings in said cause, with all things concerning the same, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors com-

plained of in the Assignment of Errors herewith filed may be reviewed and if error be found, corrected according to the laws and customs of the United States; and for an order severing his interests on appeal from the interests of the said Harry G. King, Norman I. Andrews and E. S. Edwards; and desiring to supersede the execution of the decree, your petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal a supersedeas be issued.

GUY E. BOWERMAN,
By JAMES H. RICHARDS,
Solicitors for Guy E. Bowerman.

Residence, Boise, Idaho.

By OLIVER O. HAGA.
MARVIN C. HIX.

[Endorsed:] Petition for Appeal to Supreme Court U. S. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

233 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. McCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Order Allowing Appeal and Severance.

This day came Guy E. Bowerman, by his solicitors Messrs. Richards & Haga and Marvin C. Hix, and presented his petition for an appeal to the Supreme Court of the United States and for severance, and an assignment of errors accompanying the same, which petition is granted, and it is hereby Ordered that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayer, and that a certified transcript of the record, stipulations and all proceedings be forthwith transmitted to the said Supreme Court of the United States.

And it further appearing that Harry G. King, Norman I. Andrews and E. S. Edwards were duly notified in writing to appear in court on the 25th day of June, 1917, and either join in said appeal or decline to join therein; and it further appearing that said appellees
234 have not appeared in response to said notice or otherwise, but have severed themselves in said appeal, and have declined to join therein, the said Guy E. Bowerman and his interests are

severed in said appeal from the interests of said Harry G. King, Norman I. Andrews and E. S. Edwards.

The said appeal shall operate as a supersedeas upon the petitioner filing a bond in the sum of Fifty Five Thousand Dollars ($55,000.00), with sufficient sureties, conditioned as required by law.

Dated July 30th, 1917.

WM. B. GILBERT,
United States Circuit Judge, Ninth Circuit.

[Endorsed:] Order Allowing Appeal to Supreme Court U. S. and Severance. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

235 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Bond on Appeal.

Know all men by these presents, That we, Guy E. Bowerman of St. Anthony, Idaho, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland and authorized to become surety upon bonds, as surety, are held and firmly bo-nd unto Frank R. McCormick, as Receiver of the First National Bank of Salmon, in the sum of Fifty-five Thousand ($55,000.00) Dollars, lawful money of the United States, for the payment of which well and truly to be made to the said Frank R. McCormick, as such Receiver and his successors, the said principal binds himself, his and each of his heirs, executors, administrators, and the said surety itself, its successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this the 2nd day of July, 1917.

The condition of this obligation is such, that

Whereas, the above named Guy E. Bowerman has prosecuted an appeal to the Supreme Court of the United States to reverse
236 the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, made and entered in the above entitled cause,

Now therefore, if the above named Guy E. Bowerman shall prosecute his said appeal to effect and shall answer all damages and costs if he fails to make his said plea good, then this obligation shall be void, otherwise to remain in full force and effect.

In witness whereof, the said principal has hereunto set his hand and seal and the said surety has caused its name to be hereunto sub-

scribed and its corporate seal hereto affixed by its attorneys-in-fact, duly authorized in writing, this the day and year hereinabove written.

GUY E. BOWERMAN, [SEAL.]
Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HENRY WHITSON,
Its Attorney-in-fact.
J. T. PIERCE,
Its Attorney-in-fact.

The foregoing Bond approved as to form and sufficiency this the 30th day of July, 1917.

WM. B. GILBERT,
United States Circuit Judge.

[Endorsed:] Bond on Appeal to Supreme Court U. S. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

237 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Stipulation.

Whereas, C. D. Hamner has succeeded the said Frank R. McCormick as Receiver of the First National Bank of Salmon; and

Whereas, said appellees Harry G. King, Norman I. Andrews and E. S. Edwards have refused to join with the said appellee Guy E. Bowerman in an appeal to the Supreme Court of the United States from the judgment and decree of the above entitled court in the above entitled cause; and,

Whereas, said cause was dismissed as to the said appellees George Buck, Fred G. Havemann and John Lottridge, the said appellees and each of them not having been served with process in the District Court;

It is therefore Stipulated and agreed by and between said appellant and said appellee Guy E. Bowerman, through their respective solicitors, that the said C. D. Hamner as Receiver of the First Na-

tional Bank of Salmon may be substituted for and in the name, place and stead of the said Frank R. McCormick, as such Re-
238 ceiver.

Dated this 21st day of July, 1917.

J. M. STEVENS,
JESSE R. P. BUDGE,
Solicitors for Appellant.

Residence: Boise, Idaho.

RICHARDS & HAGA,
MARVIN C. HIX,
Solicitors for Appellee Guy E. Bowerman.

Residence: Boise, Idaho.

[Endorsed:] Stipulation re substitution party appellant. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

239 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge and E. S. Edwards, Appellees.

Order of Substitution.

It appearing from the stipulation on file with the Clerk of the above entitled court that C. D. Hamner has succeeded the said Frank R. McCormick as Receiver of the First National Bank of Salmon,

It is therefore ordered, adjudged and decreed, that the said C. D. Hamner, as Receiver of the First National Bank of Salmon, be and he is hereby substituted for and in the name, place and stead of the said Frank R. McCormick as such Receiver.

Dated this 30th day of July, 1917.

WM. B. GILBERT,
United States Circuit Judge.

[Endorsed:] Order of Substitution of Party Appellant. Filed Aug. 1, 1917. F. D. Monckton, Clerk.

240 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

FRANK R. MCCORMICK, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Stipulation for Record on Appeal.

It is hereby stipulated and agreed, by and between the parties hereto, through their respective solicitors, that the following portions of the transcript of the record on appeal from the United States District Court for the District of Idaho to the Circuit Court of Appeals for the Ninth Circuit shall constitute the transcript of record on appeal from the above entitled court in the above entitled cause to the Supreme Court of the United States, to-wit:

1. Bill of Complaint, beginning on page 7 and ending on page 38 of the record.

2. Answer of Guy E. Bowerman, beginning on page 39 and ending on page 56 of the record.

3. Decision of the District Court, beginning on page 109 and ending on page 132 of the record.

4. Decree of the District Court, beginning on page 132 and ending on page 133 of the record.

5. Statement of the evidence pursuant to Equity Rule No. 75 and designated as Præcipe, beginning on page 134 and ending on page 362 of the record, excepting the following Exhibits:

241 (*a*) Exhibit No. 3, beginning on page 142 and ending on page 153 of the record, but inserting in lieu of said Exhibit No. 3 the following, to-wit: "Plaintiff's Exhibit No. 3. Oath of H. G. King, N. I. Andrews, George Buck, F. G. Havemann and John Lottridge as Directors of the First National Bank of Salmon, taken on the 10th day of January, 1911. Oath of B. F. Olden, as Director of the First National Bank of Salmon, taken on the 9th day of February, 1911. Oath of H. G. King, N. I. Andrews, John Lottridge, John C. Sinclair, J. G. Havemann and George Buck as Directors of the First National Bank of Salmon, taken on the 18th day of January, 1910. Oath of G. E. Bowerman as Director of the First National Bank of Salmon, taken on the 26th day of January, 1910. Oath of H. G. King, E. S. Edwards, N. I. Andrews, and J. C. Sinclair as Directors of the First National Bank of Salmon, taken on the 12th day of January, 1909. Oath of M. M. McPherson as Director of the First National Bank of Salmon, taken on the 19th day of January, 1909. Oath of A. J. MacNab, as Director of the First

National Bank of Salmon, taken on the 19th day of January, 1909. Oath of John Lottridge as Director of the First National Bank of Salmon, taken on the 22nd day of November, 1909. Oath of G. E. Bowerman as Director of the First National Bank of Salmon, taken on the 16th day of January, 1909. Each of these oaths *are* duly executed and in substantially the following form:

STATE OF IDAHO,
County of Lemhi, ss:

We, the undersigned, directors of the First National Bank of Salmon, located at Salmon, Lemhi County, Idaho, being citizens of the United States, and all residents of the State of Idaho, do, each for himself, and not one for the other, solemnly swear (affirm) that we will severally, so far as the duty devolves on us, diligently and honestly administer the affairs of said Association; and that
242 we will not knowingly violate, or willingly permit to be violated, any of the provisions of the Statutes of the United States under which said Association has been organized; and, each for himself, does solemnly swear (affirm) that he is the owner in good faith, and in his own right, of the number of shares of stock required by said Statutes, subscribed by him or standing in his name on the books of the said Association; and that the same is not hypothecated, or in any way pledged as security for any loan or debt."

(*b*) Plaintiff's Exhibit No. 9, beginning on page 165 and ending on page 166 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 9 No. 2199, dated July 1, 1910, payable on demand to the order of the First National Bank of Salmon, for $2,500.00, with interest at the rate of ten per cent. per annum, and signed by Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Secretary."

(*c*) Plaintiff's Exhibit No. 10, beginning on page 166 and ending on page 167 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 10. Promissory note No. 2475, dated November 2, 1910, payable on demand to the order of the First National Bank of Salmon, for $3,500.00, with interest at the rate of ten per cent. per annum, and signed by Salmon Lumber Company, Limited, by C. D. Slaughter, Manager."

(*d*) Plaintiff's Exhibit No. 11, beginning on page 167 and ending on page 168 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 11. Promissory note, No. 2551, dated December 10, 1910, payable on demand to the order of First National Bank of Salmon, for $6,000.00, with interest at the rate of ten per cent. per annum, signed by Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Manager."

(*e*) Plaintiff's Exhibit No. 12, beginning on page 168 and ending on page 169 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 12. Promissory Note, No. 2616, dated January 4, 1911, payable six months after date to the
243 order of the First National Bank of Salmon, for $3,000.00, with interest at the rate of ten per cent. per annum signed by

Salmon Lumber Company, Limited, by F. W. Carl, President, C. D. Slaughter, Secretary and Manager."

(*f*) Plaintiff's Exhibit No. 13, beginning on page 169 and ending on page 170 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 13. Promissory Note, No. 2459, dated July 11, 1910, for the sum of $1,700.00, with interest at the rate of ten per cent. per annum, payable on demand, to the order of the First National Bank of Salmon, signed by Mrs. S. A. Pollard, and F. M. Pollard."

(*g*) Plaintiff's Exhibit No. 14, beginning on page 170 and ending on page 171 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 14. Promissory Note, No. 2460, dated June 29, 1910, for the sum of $6,250.00, with interest at the rate of ten per cent. per annum, payable four months after date to the order of the First National Bank of Salmon, and signed by Mrs. S. A. Pollard and F. M. Pollard."

(*h*) Plaintiff's Exhibit No. 15, beginning on page 171 and ending on page 172 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 15. Promissory Note No. 2592, for the sum of $6,250.00, with interest at the rate of ten per cent. per annum, dated January 2, 1911, payable on demand to the order of the First National Bank of Salmon and signed by Harry Brown."

(*i*) Plaintiff's Exhibit No. 16, beginning on page 174 and ending on page 177 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 16. Articles of Incorporation of Salmon Lumber Company, having a capital stock of $25,000.00, divided into 250 shares of the par value of $100.00 each, and the subscribers being C. K. Slaughter, one share; A. K. Carl, one share; F. W. Carl, twenty-three shares; J. N. C. Lottridge, one share; C. D. Slaughter, twenty-four shares."

(*j*) Plaintiff's Exhibit No. 17, beginning on page 177 and
244 ending on page 188 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 17, Judgment Roll in an action wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon, was plaintiff, and H. G. King was defendant, being a judgment recovered against the said H. G. King for the sum of $14,397.46 for failure of the said H. G. King to pay an assessment levied by the Comptroller of the United States Currency against the shares of stock held by the said H. G. King in the First National Bank of Salmon."

(*k*) Plaintiff's Exhibit No. 18, beginning on page 188 and ending on page 191 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 18. Execution levied pursuant to judgment mentioned in Plaintiff's Exhibit No. 17, and return of the Sheriff on such execution, showing that the sheriff was unable to find any property belonging to the said defendant King not exempt from execution."

(*l*) Plaintiff's Exhibit No. 19, beginning on page 191 and ending on page 201 of the record, but inserting in lieu thereof the following, to-wit: Plaintiff's Exhibit No. 19. Judgment Roll in an action

wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon, was plaintiff, and Ray Edwards was defendant, and wherein judgment was recovered against the said Ray Edwards for the sum of $2,631.25 for failure of the said Ray Edwards to pay an assessment levied by the Comptroller of the United States Currency against the shares of stock held by the said Ray Edwards in the First National Bank of Salmon."

(*m*) Plaintiff's Exhibit No. 20, beginning on page 201 and ending on page 203 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 20. Execution pursuant to said judgment, Plaintiff's Exhibit No. 19, and return of
245 sheriff to such execution, showing that the said Ray Edwards had no property subject to levy and execution."

(*n*) Plaintiff's Exhibit No. 21, beginning on page 203 and ending on page 214 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 21. Judgment Roll in an action wherein Frank R. McCormick, as Receiver of the First National Bank of Salmon was plaintiff, and Harry Brown was defendant, and wherein judgment was recovered against the said Harry Brown for the sum of $18,498.39 on two certain promissory notes, as follows: No. 5595, dated January 2, 1911, for the sum of $6,500.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of the First National Bank of Salmon and signed by Harry Brown; No. 5595, dated January 2, 1911, for the sum of $6,250.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of the First National Bank of Salmon, and signed by Harry Brown."

(*o*) Plaintiff's Exhibit No. 22, beginning on page 214 and ending on page 216 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 22. Execution pursuant to said judgment, plaintiff's Exhibit No. 21, and return of sheriff thereto, showing that said Harry Brown had no property subject to levy and execution."

(*p*) Plaintiff's Exhibit No. 24, beginning on page 228 and ending on page 269 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 24. Judgment Roll in an action wherein Western Loan & Savings Company was plaintiff and Sophronia A. Pollard, Frank M. Pollard, First National Bank of Salmon and Frank R. McCormick, as Receiver of the First National Bank of Salmon were defendants, and wherein the plaintiff foreclosed a first mortgage on the premises on which the First National Bank of Salmon held a second mortgage, and wherein the First National Bank of Salmon filed a cross-complaint and foreclosed its second mortgage securing the payment of two certain promissory notes, one
246 No. 2459, dated July 11, 1910, for the sum of $1,700.00, payable on demand to the order of the First National Bank of Salmon and signed by Mrs. S. A. Pollard and F. M. Pollard, and one dated June 29, 1910, for the sum of $6,250.00, payable four months after date to the order of the First National Bank of Salmon, and signed by Mrs. S. A. Pollard and F. M. Pollard, and wherein the

First National Bank of Salmon recovered a deficiency judgment against said Pollards on said notes for the sum of $10,631.70."

(*q*) Plaintiff's Exhibit No. 25, beginning on page 270 and ending on page 274 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 25. Power of Attorney dated March 25, 1912, and executed by C. D. Slaughter, C. K. Slaughter, Ada D. Slaughter, J. N. C. Lottridge, as all the holders and owners of all the issued capital stock of the Salmon Lumber Company, Limited, to F. J. Cowen, with power and authority to sell and manage all property belonging to the company and to collect and receive all debts and accounts due the company, and to close up the business of the company at the earliest practical date."

(*r*) Plaintiff's Exhibit No. 27, beginning on page 281 and ending on page 282 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 27. Promissory note No. 2140, dated July 1, 1910, for the sum of $3,500.00, with interest at the rate of ten per cent. per annum, payable six months after date to the order of the First National Bank of Salmon, signed by the Salmon Lumber Company, Limited, and on which is endorsed 'Paid account principal $2,260.80, account of interest $350.00.'"

(*s*) Plaintiff's Exhibit No. 28, beginning on page 287 and ending on page 288 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 28. Promissory note No. 5595 dated January 2, 1911, for the sum of $6,500.00, with interest at the rate of ten per cent. per annum, payable on demand to the order of First National Bank of Salmon, and signed by Harry Brown."

247 (*t*) Plaintiff's Exhibit No. 36, beginning on page 301 and ending on page 306 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 36. Mortgage dated the 10th day of November, 1910, executed by Alice S. Lottridge and John Lottridge on Lot No. 7 in Block No. 5 of North Salmon Village, to secure the payment of their promissory note dated November 10, 1910, for the sum of $1,500.00, payable one year after date to the order of Ada D. Slaughter of Salmon, Idaho."

(*u*) Plaintiff's Exhibit No. 37, beginning on page 306 and ending on page 311 of the record, but inserting in lieu thereof the following, to-wit: "Plaintiff's Exhibit No. 37. Mortgage dated April 2, 1910, and executed by Alice S. Lottridge and John Lottridge on a portion of Lot 7 in Block 5 of North Salmon Village, to secure the payment of their certain promissory note dated March 21, 1910, for the sum of $3,000.00, payable on demand to the order of Ada D. Slaughter of Salmon, Idaho."

(*v*) Defendant's Exhibit No. 1, beginning on page 340 and ending on page 346 of the record, but inserting in lieu thereof the following, to-wit: "Defendant's Exhibit No. 1, Inventory of Salmon Lumber Company, Limited, on June 13, 1911, being itemized statement of accounts payable showing the total to be $2,108.28; also itemized statement of accounts receivable showing the total to be $6,522.85, and also statement of the assets and liabilities of the company, as follows:

Assets.

Cash in till	$35.15
Merchandise	25,683.12
Plant account	1,236.83
Building account	1,689.55
Expense account	1,650.74
Bills Receivable	90.10
Accounts Receivable	6,522.80
Total	$36,908.28

248 Liabilities.

Capital stock and surplus	$10,000.00
Bills payable	24,800.00
Accounts payable	2,108.28
Total	$36,908.28"

It is further agreed that an appeal from the decision and decree of the District Court in the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit was perfected by Frank R. McCormick, as Receiver of the First National Bank of Salmon.

It is further agreed, That the transcript of the record on appeal to the Supreme Court of the United States shall include the following, to-wit:

1. Opinion and decree of the Circuit Court of Appeals in the above entitled cause.
2. Notice to join in appeal, and refusal.
3. Assignment of errors on appeal to the Supreme Court of the United States.
4. Petition for appeal to the Supreme Court of the United States.
5. Order allowing appeal, and Severance.
6. Bond on appeal.
7. Stipulation for substitution of C. D. Hamner in the place of Frank R. McCormick.
8. Order for substitution of C. D. Hamner.
9. This stipulation for record on appeal.
10. Citation.

Dated this 31st day of July, 1917.

249 JAMES H. RICHARDS,
OLIVER O. HAGA,
MARVIN C. HIX,
Solicitors for Appellant.

Residence: Boise, Idaho.

JESSE R. S. BUDGE,
JAMES M. STEVENS,
Solicitors for Appellee.

Residence: Pocatello, Idaho.

[Endorsed:] Stipulation for record on appeal to Supreme Court U. S. Filed Aug. 21, 1917. F. D. Monckton, Clerk.

250 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

C. D. HAMNER, as Receiver of the First National Bank of Salmon, a Corporation, Appellant,

vs.

HARRY G. KING, NORMAN I. ANDREWS, GEORGE BUCK, GUY E. BOWERMAN, Fred G. Havemann, John Lottridge, and E. S. Edwards, Appellees.

Certificate of Clerk United States Circuit Court of Appeals to Transcript of Record on Appeal to Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit do hereby certify the foregoing two hundred and forty-nine (249) pages, numbered from and including 1 to and including 249 to be a full, true and correct copy of the record made up pursuant to the stipulation of counsel for the respective parties filed on the 21st day of August, A. D. 1917 under Rule 8 of the Supreme Court of the United States in the above-entitled cause, including the Assignment of Errors on appeal to the Supreme Court of the United States, and the opinion filed in said Circuit Court of Appeals, in the above-entitled cause, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record on Appeal to the Supreme Court of the United States in the above-entitled cause as made and certified pursuant to said stipulation.

I further certify that the cost of the above-mentioned Transcript of Record amounts to the sum of One Hundred and Forty-two Dollars ($142.00) and that the cost thereof has been paid by Messrs. Richards and Haga, counsel for the appellee, Guy E. Bowerman.

Attest my hand and the Seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, this 12th day of September, A. D. 1917.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*,
By PAUL P. O'BRIEN,
Deputy Clerk.

251 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

GUY E. BOWERMAN, Appellant,

vs.

C. D. HAMNER, Receiver of the First National Bank of Salmon, Appellee.

Citation on Appeal to Supreme Court of the United States.

To C. D. Hamner, Receiver of the First National Bank of Salmon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held in the City of Washington, in the District of Columbia, on the 8th day of October, One Thousand Nine Hundred and Seventeen, pursuant to an order allowing an appeal from a final decree of the United States Circuit Court of Appeals for the Ninth Circuit, dated the 9th day of April, 1917, in that certain suit wherein Guy E. Bowerman is appellant and you are appellee, to show cause, if any there be, why the said decree should not be corrected and why speedy justice should not be done to the appellant in that behalf.

Witness the Honorable William B. Gilbert, United States Circuit Judge for the Ninth Judicial Circuit and one of the Judges of the Circuit Court of Appeals at San Francisco, California, this 8th day of August, A. D. 1917, and of the Independence of the United States the 141st.

WM. B. GILBERT.
United States Circuit Judge for the Ninth Judicial Circuit and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

252 United States Circuit Court of Appeals for the Ninth Circuit.

No. 2742.

GUY E. BOWERMAN, Appellant,

vs.

C. D. HAMNER, Receiver of the First National Bank of Salmon, Appellee.

Service of the foregoing Citation is hereby acknowledged, together with a copy of such citation, this 14th day of August, 1917.

JAMES M. STEVENS,
JESSE R. S. BUDGE,
Attorney for the Appellee, C. D. Hamner, Receiver of the First National Bank of Salmon.

253 [Endorsed:] United States Circuit Court of Appeals for the Ninth Circuit. No. 2742. Guy E. Bowerman, Appellant, vs. C. D. Hamner, Receiver of the First National Bank of Salmon, Appellee. Citation on Appeal to Supreme Court of the United States. Filed August 21, 1917. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy. Richards & Haga, Boise, Idaho.

Endorsed on cover: File No. 26191. U. S. Circuit Court Appeals, 9th Circuit. Term No. 724. Guy E. Bowerman, appellant, vs. C. D. Hamner, as receiver of the First National Bank of Salmon. Filed October 3d, 1917. File No. 26191.

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Supreme Court of the United States

OCTOBER TERM, 1918

No. 289

GUY E. BOWERMAN, *Appellant,*

vs.

C. D. HAMNER, as Receiver of the First National Bank of Salmon, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

This action was brought by the Receiver of the First National Bank of Salmon, Idaho, against a number of the officers and directors of that Bank to recover damages alleged to have been sustained by reason of a violation of certain provisions of the National Banking Laws, particularly Section 5200 of the Revised Statutes of the United States, as amended, which, in substance, provides that a National bank shall not loan to any one party to exceed one-tenth of its unimpaired capital and surplus.

It was also charged that overdrafts had been improvidently permitted; but the recovery was ultimately based upon a number of loans made by the Bank to three parties, the aggregate of the loans to each of the parties exceeding the limit authorized by Section 5200.

The trial Court entered judgment only against King and Andrews, president and vice-president, respectively, of the Bank, and dismissed the bill as against Guy E. Bowerman, appellant here, who, while a director of the Bank, resided some 200 miles from the city where the Bank was located and took no active part in the management and had no knowledge of the violation of the Federal Statutes by the officers of the Bank.

An appeal was taken by the Receiver to the Circuit Court of Appeals, and in that Court the judgment of the trial Court was reversed, and it was held that while Bowerman could not be held liable under Section 5239 of the Revised Statutes, as he had no knowledge of the irregularities complained of, he was liable under the common law for not having taken a more active part in the management of the affairs of the Bank. And the Circuit Court of Appeals further said that the measure of liability was not the amount which the loans complained of exceeded the limit allowed by law, but that the officers and directors were liable for the full amount of the loans made to the individuals and company that had received excessive loans, less the amount that had been paid thereon, and it directed that the parties be held liable for interest on the full amount of the loans, which at this time aggregates almost as much as the principal.

From the decision of the Circuit Court of Appeals Bowerman alone has appealed to this Court.

Both the trial court and the Circuit Court of Appeals found that Bowerman had no information or knowledge of the making of the excessive loans, and the only evidence in the record of how such loans were made is found

in the testimony of the President of the Bank—H. G. King—who testified in substance (pages 70 and 84 of the record) that the excess loans were the result of overdrafts allowed by the Cashier or President from time to time without the knowledge of the directors, and that later notes were taken by the Bank for the amount of the overdrafts and that such notes were not reported to the Board of Directors or listed among the loans submitted to the Loan Committee or the Board of Directors for approval.

The excessive loans complained of were made between July 1, 1910, and June, 1911, when the Bank voluntarily closed. Bowerman denies that he was a director of the Bank after about the first of July, 1910, (p. 21, par. IV of answer) and no evidence on that point was introduced for the reason that the motion to dismiss as against Bowerman was made upon the conclusion of plaintiff's case, and he did not take the oath of office in January, 1911 (Rec., p. 47). The motion was made and sustained on the ground that no statutory liability had been established as against Bowerman, and the cause was tried and submitted in the trial court as an action on the liability of the directors, under Section 5239, but the cause was reversed in the Circuit Court of Appeals on the theory that while the record did not show statutory liability, Bowerman should, nevertheless, be held liable for having violated his common law duties as a director in not attending the meetings of the Board, although he had no notice of the meetings and resided at an inaccessible distance, in view of the means of transportation and travel from St. Anthony to Salmon City.

The net result of the decision of the Circuit Court of Appeals is that Bowerman is held liable on a ground upon which he was not tried in the trial court, and upon which he has never had his day in court, for the Circuit Court of Appeals did not reverse the cause for retrial as

to his common law liability, but directed that judgment be entered against him for the amounts due upon the Pollard, Salmon Lumber Company and Brown notes, including interest.

SPECIFICATION OF ERRORS

The errors assigned upon the appeal are set out in full in the printed record (pp. 114-117), and for a more particular statement thereof we beg to refer to such record. Briefly stated, they are:

1. That the Circuit Court of Appeals erred in reversing the decree of the District Court, when there is no evidence that Bowerman knowingly violated or knowingly permitted to be violated any of the provisions of the National Bank Act, or had any knowledge that the provisions of such Act were being violated and excessive loans made until long after such loans had been made. That there is no evidence that Bowerman was a director of the Bank during the period that the excessive loans were made, and the answer of Bowerman alleges that he resigned as a director about July 1, 1910, and the record shows that he did not take the oath of office after the stockholders' meeting of January, 1911 (p. 47, Exhibit 3).

2. That the record shows that the cause was tried in the District Court on the theory that Bowerman had knowingly violated or permitted to be violated the provisions of the National Bank Act and the complaint dismissed as against Bowerman because of the failure of the Receiver to establish such fact; but the decree of the District Court was reversed on the theory that Bowerman was liable under the rules of the common law, on which point there had been no hearing in the trial Court, and the cause should have been remanded for a new trial and Bowerman permitted to introduce evidence in support of his affirmative defense that he had resigned as a director

of the Bank and that he was not guilty of such negligence or omission of duty as to render him liable under the rules of the common law, in the event his liability under the statute is not exclusive.

3. That the cause, having been tried on the theory of statutory liability, should not have been reversed on the theory of common law liability and judgment entered against Bowerman without giving him an opportunity to show what loss or damage, if any, resulted from his alleged failure to attend the meetings of the Board of Directors, or to show the reasons why he did not or could not attend such meetings.

4. That there can be no presumption that the failure of Bowerman to attend the meetings of the Board of Directors was the cause of the excessive loans being made, and that had he attended such meetings such loans would not have been made or such loss sustained by the Bank.

5. That the Circuit Court of Appeals erred in not allowing a credit of $6,500.00 (a one-tenth part of the unimpaired capital and surplus of the Bank) on each of the three loans alleged to be excessive, and in not limiting the liability of Bowerman to the difference between the amount of the loan and the amount authorized to be loaned to such parties under the National Bank Act.

6. That the Circuit Court of Appeals erred in directing the District Court to enter a decree against Bowerman for interest on the full amount of the loans, or any part thereof.

7. That the Circuit Court erred in holding that the Bill of Complaint was broad enough to charge a violation of the common law duty of a director on the part of Bowerman, and in holding that there was any liability on the part of Bowerman under the rules of the common law for his alleged negligence, for the reason that Section 5239 of the Revised Statutes fixes the liability of directors of National Banks and precludes a common law liability.

8. That the decision of the Circuit Court of Appeals and the decree which it directs to be entered will deprive Bowerman of his property without due process of law and deprive him of his rights under the Constitution and laws of the United States.

BRIEF OF THE ARGUMENT.

The liability for making excessive loans is determined exclusively by Section 5239

Section 5239 of the National Bank Act comprehends all the express commands to do or not to do, as to directors, contained in the National Bank Act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, and liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute, without depriving the directors of an immunity conferred upon them.

Yates v. Jones Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002.

Chesbrough v. Woodworth, 244 U. S. 72, 61 L. Ed. 1000.

The spirit and intent of the National Bank Act renders necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the National Bank Act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that Act.

Yates v. Jones Nat. Bank, *supra.*

The words "shall knowingly violate, or knowingly permit", found in Section 5239, were intended to express the rule of conduct which the statutes establish as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national

banks. Congress did not make negligence the test of liability, but the fact that the Act was violated *knowingly*, although there may be a violation "in effect intentional", and therefore within the statute, where one deliberately refuses to examine that which it is his duty to examine.

Yates v. Jones Nat. Bank, *supra*.

Jones Nat. Bank v. Yates, 244 U. S. 541, 60 L. Ed. 788.

Thomas v. Taylor, 224 U. S. 73, 56 L. Ed. 673.

One acting for another without consideration is not bound, either in law or morals, to do more than one would do generally for himself under like conditions, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case and under certain circumstances may not be want of ordinary care in another case or under other circumstances.

Briggs v. Spaulding, 141 U. S. 132, 35 L. Ed. 662.

Liability should not lightly be imposed upon honest officials who are chargeable at most with passive negligence, and it must be made to appear that the losses for which a director is required to respond under Section 5239 *were the natural and necessary consequence of omission on his part.*

Briggs v. Spaulding, *supra*.

Where by law a responsibility is made to arise from the violation of a statute *knowingly*, proof of something more than negligence is required; that is, that the violation must in effect be intentional.

Yates v. Jones Nat. Bank, *supra*.

McDonald v. Williams, 174 U. S. 397, 43 L. Ed. 1022.

Potter v. United States, 155 U. S. 438, 446, 39 L. Ed. 214, 217.

Where the action or passive negligence of a bank director results in a violation by the bank of Section 5200 the rule expressed by Section 5239 is exclusive and precludes a common law liability.

Chesbrough v. Woodworth, *supra.*

Under Section 5200 of the Revised Statutes the Damages Cannot Exceed the Amount That the Loan Exceeds the Statutory Limit

A National Bank director is liable only for the damages "which the association, its shareholders or other persons, shall have sustained in consequence of such violation." And where it is charged that excessive loans have been made in violation of the provisions of Section 5200 a director cannot be held liable for more than the excess.

Section 5239, Revised Statutes.

City Nat. Bank v. Crow, 27 Okla. 107, 111 Pac. 210.

No Right to Interest Until Judgment or Decree Is Entered

Where a director of a bank is charged only with a passive negligence and not with the misappropriation of funds, and the amount is unliquidated, there is no right to interest until judgment or decree is entered.

United States v. North Carolina, 135 U. S. 211, 34 L. Ed. 336.

Dresser v. Bates, 250 Fed. 525, 552.

Pike v. Gregory, 55 C. C. A. 78, 118 Fed. 128.

Cooper v. Hill, 36 C. C. A. 442, 94 Fed. 582.

A Litigant Cannot Change His Theory on Appeal.

A litigant cannot try a case upon one theory and then seek a reversal of the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged or tried in the court below.

M. K. & T. Ry. Co. v. Wilhoit, 87 C. C. A. 401, 160 Fed. 440.

Lutcher & Moore Lbr. Co. v. Knight, 217 U. S. 257, 54 L. Ed. 757.

Lesser Cotton Co. v. St. Louis etc. Ry. Co., 114 Fed. 133.

The case against Bowerman having been brought, tried and determined in the trial court on the theory that he was liable under Section 5239 of the Revised Statutes for loans made in excess of the limit fixed by Section 5200, and judgment having been entered dismissing the bill as against him without any evidence in his behalf, the Circuit Court of Appeals cannot find him liable under the common law and direct judgment to be entered against him without a retrial, and thus deny him an opportunity to put in his case. To do so would be to deprive him of his day in court.

Saunders v. Shaw, 224 U. S. 317, 61 L. Ed. 1163.

Gracey v. St. Louis, 213 Mo. 384, 111 S. W. 1159.

Robson v. Hamilton (Ore.) 69 Pac. 651.

Allen v. Parmalee, 73 C. C. A. 402, 142 Fed. 354, 363.

Kossuth State Bank v. Richardson, 141 Ia. 738, 118 N. W. 906.

ARGUMENT

The judgment against the appellant Bowerman is based on a violation of Section 5200 of the Revised Statutes of the United States, as amended, which provides in substance that a National Bank shall not loan to exceed one-tenth of its unimpaired capital and surplus to any one party. The trial court held that the Bank having violated the provisions of the National Bank Act, Section 5239 of the Revised Statutes furnished the exclusive rule by which to measure the liability and standard of conduct of the directors and officers of the Bank. The

trial court further held that Bowerman did not knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate the commands of the Act, and that he had not been so grossly negligent and inattentive to duty as to render his lack of knowledge in effect intentional. The Bill was therefore dismissed as against all the defendants except King and Andrews, who were President and Vice-President, respectively, of the Bank.

The judgment was based on the excessive loans made to three different parties. No loan was by itself in excess of the amount permitted to be loaned under the statute, but the aggregate of the loans to the Salmon Lumber Company exceeded the statutory limit. The aggregate of the loans to the Pollards exceeded the limit, and the aggregate of the several loans to Harry Brown exceeded the limit.

The loans were made at different times and in varying amounts, and the liability was based as before stated upon the violation of the statute, and not upon the fact that the borrowers were not entitled to any credit or to borrow the limit permitted to be loaned to any one individual. The trial court therefore held King and Andrews liable for the *excess*, and not for the *entire loans*.

The Circuit Court of Appeals not only reversed the trial court as to its decision on the liability of Bowerman, and held him liable to the same extent as King and Andrews, but it also reversed the trial court on the extent of the liability of King and Andrews, and held them liable not only for the amount that the bank had loaned to the three borrowers named above in excess of the statutory limit, but it held Bowerman, King and Andrews liable for the full amount of the loans, with interest, less the amount collected thereon by the Receiver.

The difference in the conclusions reached by the two courts results from a fundamental difference in the con-

struction which they placed on the decisions of this court construing Section 5239 of the Revised Statutes. Both courts cite substantially the same authorities in support of the conclusions reached, but the trial court construed Briggs v. Spaulding, 141 U. S. 132; Yates v. Jones National Bank, 206 U. S. 158, and Thomas v. Taylor, 224 U. S. 71, as holding that Section 5239 furnishes the exclusive rule by which to determine the right to recover damages from Directors, based upon a loss alleged to have resulted from the violation by the Directors or the Bank of a duty expressly imposed upon them by the National Bank Act. The Circuit Court of Appeals, however, places a wholly different construction on the decisions of this Court, a construction which we are convinced this Court never intended. The Circuit Court of Appeals says in its opinion in this case (Record, page 109):

> "The statutory liability of Directors of National Banks, as provided in Section 5239, is undoubtedly the exclusive rule by which to measure the right to recover damages from Directors, based upon a loss alleged to have resulted *solely* from violation by such Directors of a duty expressly imposed upon them by the provisions of the National Bank Act."

And the court then proceeds to show that Bowerman, who had not attended either the stockholders or directors meetings of the Bank, had thereby failed to properly discharge his common law duties as a Director, and could claim no immunity or protection under Section 5239, but would be liable for all losses, to be determined according to the rules of the common law, sustained by the Bank from a violation of the excess loan provision of the National Bank Act, and that King and Andrews had not only violated the express commands of the Act in the making of these excessive loans, but in doing so they had also negligently or unfaithfully discharged their duties under the common law as directors of the bank, and that

having violated their duties both under the statute and the common law they likewise were not entitled to any immunity or protection under the statute, and that the court could therefore ignore the statute entirely and measure their liability by the rules of the common law. The Court says the damage did not result "*solely* from violation by such directors of a duty expressly imposed upon them by a provision of the National Bank Act." In other words, the Circuit Court of Appeals held in this case, and its decision rests upon that proposition, that if an officer of a National Bank violates any of the provisions of the National Bank Act and, in doing so, also violates some duty under the common law that he owes to the stockholders or depositors, the right of recovery should be according to the *rules of the common law*, and in such cases it concludes that the measure of damages and standard of conduct fixed by the statute is not available to the directors or officers of the bank.

The Circuit Court of Appeals cites in support of its construction the case of Yates v. Jones National Bank, 206 U. S. 158, and Thomas v. Taylor, 224 U. S. 73, but clearly this Court held in both of those cases the very opposite of the rule adopted by the Circuit Court of Appeals. It is true that at one place it used an expression, in Yates v. Jones National Bank, *supra*, which might, if taken by itself, bear the construction placed upon the case by the Circuit Court of Appeals, but when the decision as a whole is considered it is manifest that the Court did not intend that the sentence or statement referred to by the Circuit Court of Appeals should be taken literally or construed as that court has construed it. On page 177, this Court said:

> "Considering the text of the National Bank Act, as now embodied in the Revised Statutes, including Section 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages from directors, based upon a loss alleged to

have resulted *solely* from a violation of such directors of a duty expressly imposed upon them by a provision of the Act."

The Court then analyzes Section 5239, and proceeds:

"As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the National Bank Act and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that a liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute without depriving directors of an immunity conferred upon them. That the words 'shall knowingly violate or knowingly permit,' etc., found in the first sentence of 5239, Rev. Stat., were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to National Banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears 'that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title.' Mark the contrast between the common law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.' "

And the Court further says:

"And general considerations as to the spirit and intent of the National Bank Act (citing authorities) also render necessary the conclusion that the measure of responsibility concerning the violation by directors of express commands of the National Bank Act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act. That is, a contrary conclusion would lead

> *to a varying measure of responsibility in the several states in which the question of liability might arise, depending upon the conceptions of the state courts of last resort as to the meaning of the Act of Congress imposing the duty.*"

And after showing that the court below had erred in attempting to apply the common law rule to a case where the act itself furnished a measure of liability, the court says:

> "And because we have applied in this case to the duty expressly imposed by the statute the standard of conduct established therein, we must not be considered as expressing an opinion upon the correctness of the views enunciated by the court below concerning the standard which should be applied *solely* under the principles of the common law, to fix the civil liability of directors in an action of deceit."

From the statement last quoted it is clear that this court held that the rule as to liability under the common law could be applied *only* to a case where there was no violation of the express provisions of the statute and where the statute had not prescribed either the standard of conduct or the measure of liability; this is the very opposite of what the Circuit Court of Appeals concluded in the case at bar.

The rule of the Circuit Court of Appeals seems so manifestly wrong that we do not deem it necessary to argue at length that this court never intended to place any such construction on the liabilities of directors of National Banks. In Yates v. Jones National Bank, *supra*, the court calls attention to the reason for making the standard of conduct and the measure of liability uniform throughout the nation and for making it definite and certain. It says (p. 178):

> "Thus, a contrary conclusion would lead to a varying measure of responsibility in the several states in which the question of liability might arise, depending on the conceptions of the state courts of last re-

sort as to the meaning of the Act of Congress imposing the duty. Hence, it would follow that the same provision of the statute might mean one thing in one state and a different thing in another. The confusion which would result is aptly illustrated by a review made by the Supreme Court of Ohio in the recent case of Mason v. Moore, 73 Ohio State 275; 45 L. R. A. (N. S.) 597, of the conflicting state adjudications as to the proper rule to be applied to fix the liability of bank directors to third persons in an action of deceit at common law. The frustration of the public policy embodied in the National Bank system by the crippling of the usefulness of such institutions which would result from holding that directors, in performing the duties imposed upon them by National Bank Acts, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express command, but by another and different one, is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of the duties imposed by the statute because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate."

In the case at bar the Bank violated Section 5200 by making excessive loans. If the wrongful acts resulted from the directors and officers of the Bank *negligently* overlooking the fact that the borrowers had already reached the statutory limit of indebtedness to the Bank or from other acts of negligence, the liability for loss ought not to be greater or the measure thereof more severe than where the violation of the statute is due to the officers *knowingly* and *intentionally* making excessive loans. Under the rule of the Circuit Court of Appeals a person who knowingly and intentionally violates the Act is liable under the statute only in the event there is no cause for action against him for negligence under the common law or in any event he may be held either under the statute or the common law, but the action under the statute is, according to their rule, *exclusive* only in the

event there is no common law liability. If this rule were to be applied the liability of directors would be one thing in one state and another thing in another state, for the common law rule of liability is not the same in all the states, and there is, of course, no national or federal common law. The confusion that would result is well illustrated in the decision of the Supreme Court of North Dakota in the case of Hart v. Evanson, 14 N. D. 570; 105 N. W. 942; 3 L. R. A. (N. S.) 438, wherein the court reviews the rule of liability of directors to depositors and creditors of banks in a number of the states.

We think the decisions of this Court on the liability of National Bank directors and officers clearly establish the rule that if the directors have knowingly violated or knowingly permitted officers of the bank to violate any of the provisions of the National Banking Act they are liable for all damages which "the association, its shareholders or any other persons shall have sustained *in consequence of such violation.*" The statute imposes a number of burdens on directors and bank officials, it prohibits loans however well secured in excess of 10 per cent of the capital and surplus, it makes requirements relative to loans on real estate, it requires the making of reports to the comptroller, and the publication of reports; and it makes all the shareholders liable for assessments equal to the full amount of their stock, and having imposed these burdens and obligations on directors, officers and shareholders for the protection of depositors, it proceeds to establish a standard of conduct and a measure of liability, and we respectfully submit that under the following decisions of this Court that liability *is exclusive.*

Cheesbrough v. Woodworth, 244 U. S. 72.
Jones Natl. Bank v. Yates, 240 U. S. 541.
Thomas v. Taylor, 224 U. S. 73.
Yates v. Jones Natl. Bank, 206 U. S. 158.
Briggs v. Spaulding, 141 U. S. 132.

The decision of the Circuit Court of Appeals must be reversed unless this Court concurs in the view that the statute furnishes the standard of conduct and the measure of liability only when there is no liability under the common law, and such a rule, we submit, is obviously wrong and would lead to an intolerable situation and to endless confusion.

We have so far considered the case from the standpoint of the liability of Bowerman under the common law, and we shall now pass to the other phase of the question, viz.: whether he should be held liable under the statute, and if so, what would be the measure of his liability.

Is Bowerman Liable Under Section 5239, and if so, What is the Measure of his Liability?

Both the trial court and the Circuit Court of Appeals found that Mr. Bowerman had not knowingly or intentionally violated the Banking Act. But the Circuit Court of Appeals held that his failure to attend the meetings, notwithstanding he resided at an almost inaccessible distance from the bank, constituted sufficient negligence to render him liable under the common law, though not under the statute. The trial court reached its conclusion on the theory that unless his passive negligence and nonaction was so gross and flagrant as to in effect charge him with having intentionally shut his eyes to the wrongful acts of the officers and to information about the condition of the Bank, he could not be held liable under the statute, and we think the conclusion of the trial court is in harmony with the decisions of this Court. The case is here on appeal and there may be a full review, both as to the facts and the law, but we submit that in a case of this character great weight shuold be given to the findings of the trial court on matters of fact. It saw and heard the witnesses, and it is familiar with local conditions, and it would seem to be in a better position to pass on the facts than the reviewing court.

In the case at bar, the learned trial Judge gives a remarkably clear and comprehensive review of the facts, weighing every consideration and every element that would tend to establish negligence; and it considers the facts in the light of the local conditions and in the light of the conditions as they existed at the time it is charged Bowerman did not use the diligence that he should have used. Considering the thorough familiarity of the trial Judge with the geography of the State and business conditions therein during the past thirty years, and his familiarity with the practical side of banking, we especially commend his comprehensive decision to the consideration of this Court. It is difficult to select any part of the decision as being more important than another, but we beg particularly to refer to what he says with special reference to the appellant Bowerman (Record, pp. 36-40):

> "A closely related question, but one not so free from doubt, is suggested by the defendant's non-residence. For the plaintiff it is urged that the fact is without significance, while upon the other side it is put forward as of controlling importance. The sounder view is thought to lie between the two extremes. Upon the one hand, a director must be something more than a mere figure-head; there is no such thing as a nominal directorship. It is a matter of common knowledge that directors are usually chosen because of their standing in the community, and for the purpose, among others, of inspiring public confidence, and drawing business to the bank. Their names are carried upon the stationery, and in advertising literature, as a sort of a guarantee that the management of the bank will be in good hands. Gibbons v. Anderson, 80 Fed. 345; Campbell v. Watson (N. J.) 50 Atl. 120; Warren v. Robinson (Utah), 57 Pac. 287; Williams v. McKay (N. J.) 18 Atl. 824; Marshall v. Bank, 85 Va. 676, 17 Am. St. Rep. 84. Be the circumstances what they may, a director rests under the obligation to give a reasonable measure of attention to, and to exercise reasonable diligence in protecting the interests of the bank. But, upon the

other hand, what his duty may be in any specific case must be determined in the light of the circumstances of the case, for here, as elsewhere, questions of negligence are to be decided not by the application of some schedule of specific duties, but by reference to the circumstances of each particular case. No one, for instance, would seriously affirm that the failure of a director to attend a board meeting always and under all circumstances amounts to a breach of duty. It may or may not constitute negligence, depending upon the conditions of the particular case. No one expects or assumes that any director will always be present, and to require constant attendance would be to exact a measure of diligence in excess of what is reasonable. As was said in Rankin v. Cooper, 149 Fed. 1010: 'Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinary prudent and diligent men would exercise under similar circumstances. The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible.' See also: Briggs v. Spaulding, *supra*; Yates v. Jones National Bank, *supra;* Thomas v. Taylor,

supra; Mason v. Moore, 73 Ohio St. Rep. 290, 4 L. R. A. (N. S.), 597; Movius v. Lee, 30 Fed. 298; Chesbrough v. Woodworth, 195 Fed. 875; Warner v. Penoyer, 91 Fed. 587. In this last case it was said: 'As to all these losses, the case for the complainant seems to have been prepared and presented upon the theory that when a bank has failed, and it appears that there was a general supineness and looseness of management by the directors, the burden of exoneration for the losses is on the directors. This is not a correct theory. * * * The Court cannot decree upon conjecture. As against two of the directors, the case for the complainant is predicated upon their failure to attend the semi-annual meetings of the board. It is not a necessary or legitimate inference that this omission was a contributory cause of the losses. It does not follow because a director has failed to attend meetings, that he is legally or morally responsible for the disasters that may have befallen his bank.'

"Now in the light of these principles it becomes manifest that the defendant's non-residence is one of the material circumstances that must be considered in determining whether or not he was negligent. The share-holders doubtless all knew where he lived, and if any depositor had any information touching his standing or qualifications as a member of the board he doubtless also knew that he resided at St. Anthony, and was there engaged in the banking business. Having this knowledge, he would not, as a reasonable man, assume that the defendant would frequently spend a week's time in taking the long stage and railroad trip to attend a board meeting, or that he would give attention to the details of the administration. For him to have been in regular attendance would have entailed hardships and a loss of time and money wholly disproportionate to the apparent need for his presence. No one would have expected it, and to do more than anyone expects is generally to exercise not ordinary, but extraordinary, care.

"In speaking thus, I am not to be understood as holding that the defendant could with propriety ab-

sent himself from all the board meetings during a course of several years, or remain in ignorance of the general policies and general course of business in the bank. Even though he never went to Salmon City, he might, through the medium of reports from time to time keep himself measurably well informed. By reason of his business experience, and especially his long experience in banking, he would know what to require in such reports, and it is to be assumed that, generally speaking, the desired information would be given, and given correctly. Insofar as the action of the board of directors is concerned, he could, without great expense or trouble, have had a transcript of the minutes of their meetings from time to time. While he could not, without being present at the board meetings, formally give effect to his views, he could, if he found the executive officers inclined to indulge in improper practices, or to pursue unwise policies, exercise a measure of restraining influence through correspondence. In the absence of evidence to the contrary, I think it must be assumed that he thus kept himself advised; for neglect to employ means of information so obvious and inexpensive would clearly be chargeable as negligence.

"True, in a letter from the defendant to King, dated August 29, 1911, there are statements to the effect that he had difficulty in procuring information, but the letter can hardly be regarded as competent proof of this fact. The letter was written after disaster had befallen the bank, and the statements referred to are plainly self-serving in character. The communication was introduced in evidence by the plaintiff only for the purpose of establishing an admission on the part of the defendant that he had knowledge in July, 1910, that the executive officers were pursuing certain policies which he regarded as unwise. In this connection it should be added that the defendant was not called to the witness stand to explain to what policies the letter refers, nor did he choose to testify in his own behalf, although he was present at the trial. The letter itself furnishes no proof of a knowledge of excess loans.

"Now, assuming that the defendant had the infor-

mation which he would naturally acquire by infrequently attending the board meetings, and from a reasonable system of reports, can it be held that he is in anywise responsible for these loans? Did he, with knowledge, remain silent and inactive, when he should have spoken and made active opposition, and did he thus knowingly assent to, or knowingly permit the loans to be made? The evidence is perhaps somewhat wanting in clearness upon the point, but, as I understand, these loans, insofar as the excess is concerned, were all made between July 1, 1910, and February 1, 1911. In each case there was an agreement between King, as the chief executive officer of the bank, and the debtor, for credit, to be extended in the first place by checks drawn on account, the amount of which was subsequently to be covered by notes. At the end of the month, or at such time as King required, the debtor came in and gave a note for the aggregate amount of the overdrafts theretofore allowed. In the monthly report of 'loans and discounts' the executive officials did not exhibit the loans so made, and they were discoverable only upon an examination of the individual depositors' ledger or upon a complete analysis of the aggregate item of overdrafts, for which no detail was reported. Neither were such loans entered in the special loan and discount register. Plainly such a system of bookkeeping and reports, if not designed to conceal, would in effect enable the executive officers to make excess loans, and to withhold knowledge thereof from the directors, unless the latter were sufficiently alert to insist upon an examination of the individual depositors' ledger. And unless a director suspected a disposition to violate the law in this respect, he might very well overlook the necessity for making such an investigation. Doubtless appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all of the directors must have had knowledge thereof and assented thereto. No loan claimed to have been excessive was made prior to October, 1909. Of dates subsequent thereto several loans or discounts are disclosed by

the books in excess of $5,000.00. It must be borne in mind that of this number those which were not over $6,000.00 did not exceed the statutory limit. As to each of the others an explanation is furnished by King which makes it clear that he did not deem them to be obnoxious to the limitation. We need not consider whether his construction of the law can in all cases be upheld; to say the least, his explanations are plausible, and leave little ground to question his good faith. The real point is that the record leaves no room for doubt that he was aware of the limitation, and claimed that he was keeping within it. Surely the Treasury Department could not have been unadvised of the loans relied upon to establish a wrongful custom, but so far as appears no complaint was ever made that they were excessive. In the light of these considerations, when we consider the manner in which the three loans in controversy were made and the failure of the books and reports directly to show their excessive character, together with King's testimony,the impression is left that the executive officers of the bank were conscious that the making of excess loans was likely to elicit disapproval and criticism from some quarter; or at least that it did not have the sanction of custom. In passing upon the question of the reasonableness of Bowerman's conduct, it is to be borne in mind that he had no interest, direct or indirect, in these loans, and that he stood to sustain a substantial loss ($10,000.00 on account of his investment and an additional $10,000.00 on account of a possible assessment of his stock) before any injury could come to depositors. A special committee on loans and discounts, as well as an examining committee, was maintained, and an additional safeguard, it was reasonable to assume, lay in the fact that the vice-president, for whom he seems to have had a high respect, was being paid a compensation sufficient to obligate him to give a substantial part of his time to the supervision of the affairs of the bank. That he should repose considerable confidence in these agencies was neither unnatural nor unreasonable. It may be conceded that in his failure to attend any of the board meet-

> ings, and perhaps in failing to exact detailed reports, he was measurably wanting in the exercise of due care, but upon the whole I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he knowingly permitted the loans to be made. As to him, therefore, the suit will be dismissed."

It should be noted also that Mr. Bowerman did not seek election to the Board of Directors; his stock was not represented either in person or by proxy, so far as the record shows (Record, p. 45), but he was apparently made director simply because of his large stock holdings, so that he could protect his own interests. It should be noted also that Mr. King, the president of the bank, and the active manager of it, owned $14,000.00 worth of stock, and the vice-president $6,600.00 and the cashier $1,000.00 (Record, p. 100). The active officers of the bank, were, therefore, large stockholders, and it is reasonable to assume that Mr. Bowerman believed that the bank was being properly managed; the selfish interest, if nothing else, of the officers of the bank, would so require. Certainly they would have nothing to gain by reckless or improper management. And the evidence is undisputed that until some time in 1910 the bank was prosperous and well-managed. On that point we again beg to quote from the opinion of the learned trial judge, for he gives us tersely the reasons why the bank failed. He says: (Record, p. 32.)

> "The evidence does not support the view that the Langsdorf purchase in the spring of 1909 was detrimental, but the impression I get from the entire record is that up to some time in 1910 the business of the institution was prosperous. A railroad was building into Salmon City, and as is common experience in such cases the abnormal amount of money that it put into circulation for labor and supplies, coupled with the natural disposition of the community to overestimate the final value of a railway

connection, unduly stimulated values and business enterprises. In 1909 the road was completed to Salmon City, and, contrary to expectations, it terminated there, and further construction work was abandoned. The community was again thrown back largely upon its former resources. In the meantime another bank had been opened and presumably was securing some of the business which would otherwise would have gone to this bank. And during the year the defendant (King) was thrown into litigation, which, while it did not directly involve the bank, still, because of its nature and the publicity given to it, had a tendency to undermine public confidence. In view of these conditions it is entirely possible to reconcile the theory of prosperity and profits up to July, 1910, with the fact of insolvency a year later. It is needless to point out that the banking business is of a most sensitive character, and radical changes are not unfrequently wrought in a very short time. The three large loans upon which the plaintiff relied and which are next to be considered, are highly illustrative. Two of the debtors were manufacturers of building material, much in local demand in 1910, and the other was a retailer of such materials. Had the building operations continued in 1911 as in 1910, it is wholly improbable that there would have been any loss upon these accounts; the enterprises of these three borrowers would in all likelihood have been profitable and they would have been able to take care of their obligations. Building ceased and left them bankrupt, and the bank with a loss of between twenty and twenty-five thousand dollars. Moreover, notwithstanding the shrinkage of assets resulting from these unfavorable conditions, another bank in the community offered in June, 1911, to take over the business of this bank and pay the creditors in full, but apparently the proposition failed to secure the approval of the comptroller of the currency. In consideration of these conditions, I am unable to conclude that the action of the board in declaring the dividend, and in setting apart a surplus fund on July 9, 1911, (should be 1910), signifies either bad faith on the part of the

defendant (King), or a careless or unreasonable exercise of judgment. I am satisfied that he did not knowingly or intentionally violate the law."

And in referring to the circumstances under which the eexscsive loans were made, the trial court says (Record, p. 35):

"The defendant (King) himself explains the circumstances under which the loans were made, and accepting it as substantially correct—and there is no evidence to the contrary—I am inclined to think that he was warranted in extending credit in each case up to the statutory limit. It must be borne in mind that the full amount of these loans was not made all at once. When credit was first promised it was not anticipated that so much would be required. The needs of the borrowers expanded beyond the expectations, and, as is a common experience, it may have been here found necessary to extend further credit in order to protect the existing loans. As already explained, the lines of business in which these three debtors were engaged were naturally first to suffer from the depression which followed the "boom" pending the building of the railroad, and the fact that they were enterprises on which the original loans were made turned out to be excessive does not under the circumstances reflect upon the defendant's judgment, and certainly does not signify bad faith or want of ordinary care. Upon the whole I am inclined to the view that in extending credit up to the statutory limit he acted with ordinary prudence * * *

"While I have found the conduct of the defendant (King) wrongful, it was not of a flagrant character. I am inclined to think that he continued to extend credit after the limit was reached with the hope of protecting the existing loans, and while this consideration does not excuse, it tends to extenuate the fault. He received no benefit from the use of the money. No interest will, therefore be allowed. (Citing cases)."

In view of the facts as found by the trial court as to the reasons for the shrinkage in values and the prosperous condition of the bank up until late in 1910, Mr. Bowerman cannot be charged with any special wrong for not having attended the meetings of the board of directors prior to July, 1910. Whether he was advised of any necessity of his attending the meetings after that date the record does not show, but it does show that the excess loans were not submitted to the directors or the loan committee for approval, and that the directors knew nothing of such loans. This, for the reason, as is explained by Mr. King, that he did not consider them as coming within the technical meaning of loans, but they were notes given to take up overdrafts that the cashier or president had permitted under a tentative arrangement with the borrowers that the bank would take care of what they needed in their regular course of business, not anticipating that their needs would be so great. Payrolls had to be met and checks were given by the customer and honored by the bank, and at the end of the month notes were given to take up the overdrafts, but these notes were not placed on the list of loans submitted to the directors for approval. There is no evidence, therefore, that Mr. Bowerman would have known of these excess loans if he had attended the meetings. Besides, Mr. Bowerman alleges in his answer that he resigned as director about the first of July (Record, pp. 21, 22, 28), and the record does not show that he took the oath of office after the election in January, 1911. (Record, p. 47.) And a part of the excess loans were made after January, 1911, and substantially all of them were made after July, 1910.

We submit, therefore, that the trial court was clearly right in dismissing the bill as to Bowerman, and in holding that he was not guilty of such negligence as to charge him in effect with knowledge of the excessive loans on which the judgment is based.

But if for any reason the court should conclude that appellant Bowerman is liable, either under the statute or the common law, then manifestly his liability cannot be *in excess of the amount which the loans in question exceed the statutory limit.* This was the amount for which the trial court held King and Andrews were liable, and it did so on the theory and for the reason that the loans had been properly made up to the limit of liability, and that if the loans up to that amount were not good it was clearly due to an error of judgment. Clearly there is no basis under the facts for holding that these borrowers were not entitled in 1910 and 1911 to some credit, and the trial court found they were entitled to credit to the limit of the statute, and its conclusion was manifestly right under the evidence in the case. Yet the Circuit Court of Appeals, as stated before, held Bowerman liable for the full amount of the three loans, and in effect makes him a guarantor of the loans made by the bank.

Counsel cannot seek recovery on one theory in the trial court and on another in the appellate court.

If we are correct in our interpretation of the decisions of this court above referred to, this case is necessarily disposed of, but in addition to that proposition we feel there are other reasons amply justifying a reversal of the decree appealed from. As we have shown above, it seems clear from the complaint that this action was based upon a violation of the Federal statutes and not only this, but the record further shows conclusively as hereinafter pointed out, that this case was tried by counsel for all parties, and by the trial court on the theory of a *statutory* liability, which involves the rule that a cause having been based, tried and decided on one theory, should not and cannot on appeal be determined upon a wholly different theory.

This rule is well stated in Mathieson v. St. Louis &

San Francisco Ry. Co., 219 Mo. 542, 118 S. W. 9, an action for damages under a statute in which, after a trial of the case, it was held on appeal that the complaint did not state a cause of action under such statute, and the court, in holding that there could not be a change of theory in the Appellate Court, where counsel for appellants contended that the complaint and the record would support a judgment under the rules of the common law, says:

> "Counsel for respondent seeks to avoid the result of the conclusions reached in paragraph one of this opinion (that the petition did not state a cause of action under the statute) by insisting that the petition states a good cause of action under the common law, and that he is entitled to recovery independent of the statute pleaded.
>
> "In our opinion, that contention is untenable; and it is apparent from reading the petition that the suit is bottomed upon the statute, and no attempt whatever was made to state a cause of action under the common law. The record also shows that the case was tried upon that theory, and he should not be permitted to change front in this court."

And also in San Juan Light & T. Co. v. Requena, 224 U. S. 89, 97, 56 L. ed. 680, 683, an action that was tried on one theory in the lower court and in which it was urged on appeal that the case should be reversed on a different theory, the court says:

> "Effect must therefore be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

This case was based and tried upon the theory of a violation of Sections 5200 and 5239 of the Revised Statutes of the United States, and the whole record clearly shows that the appellee was relying upon the alleged vio-

lation of the statutes relative to National Banks, and the motion of appellant Bowerman to dismiss the Bill as against him (p. 83, Record) shows that he also was trying the case on the theory of a statutory liability, and the decision of the lower court in dismissing the Bill as to Bowerman (p. 30-31, Record) shows that so far as that court was concerned the case was tried to it on the theory of statutory liability, exclusively.

On page 3 of the record, appellee in his Bill charges that the defendants Bowerman and others, and each of them

> "knowingly permitted and assented to the making of loans by the officers, agents and servants of the First National Bank of Salmon far in excess of the limit provided by Section 5200 of the Revised Statutes of the United States, whereby large sums of money belonging to the stockholders and depositors of said Bank became wasted and lost."

This is the sum and substance of the whole charge against the defendants and all the proof and evidence was directed to the support of such charge.

The Court was clearly of the opinion that the Receiver was relying upon the charge of a knowing violation, or knowingly permitting a violation of the statutory duty, and not a violation of the common law duty.

After reciting on page 30 of the record that there are five general charges of misfeasance, the Court then quotes from Sections 5147 and 5239 R. S. U. S., and on page 31 of the record says:

> *"Considering the nature of the wrongdoing charged,* it is thought that these statutory provisions, rather than the general rules of the common law, furnish the measure of the defendants' duty and responsibility."

The court then proceeds to discuss the liability of the defendants for purchasing the business of Langsdorf and Company because of which purchase it was contended

that there had been a violation of the National Bank Act, since there were certain loans taken over which were in excess of loans permitted to be made to any one person under the provisions of that Act, but the Court, in holding that there was no liability, on page 113 of the record, says:

> "The mere fact that as a part of the assets so purchased there were loans which in amount exceeded the limit to which National Banks are confined, is quite immaterial (citation). Assuming that such loans were retired when they fell due, *there was no semblance of a violation of the National Banking Act.*"

Clearly, had the Court been considering the liabilities of the defendants from the standpoint of negligence in administering the affairs of the Bank, it would not have said in holding that there was no liability because of the purchase of Langsdorf and Company that "there was no semblance of a violation of the National Banking Act."

The Receiver further contended that the defendants were liable for making a dividend on the 1st day of July, 1910, but the Court again, in holding that there was no liability on account of this dividend, first says on page 31 of the record:

> "If the defendant is liable at all in this action, he is liable for the whole amount of this dividend on the theory that disregarding the obligations of his trust, *he knowingly violated the provisions of the law.*"

And further says on page 116 of the record:

> "I am satisfied that he did not knowingly or intentionally violate the law."

Then, again, the Court, in considering the charge that overdrafts had been made in violation of the By-Laws of the Bank, says:

> "The National Banking Law does not prohibit overdrafts."

If it had appeared to the Court that the case was being tried on the theory of general negligence it would have been immaterial whether the National Bank Act does or does not prohibit overdrafts.

The greater part of the evidence submitted by the Receiver is to the effect that loans in excess of the amount permitted by statute were made to a number of individuals, and the Court again, in discussing these excess loans, says that:

> "These loans, therefore, in so far as they exceed the amount, were in violation of the statute." (p. 34, record.)

The Court, in discussing the liability of Andrews after having concluded that the defendant King was liable for knowingly violating the law, says (p. 35, record):

> "While the defendant Andrews participated less actively than King in the management of the Bank, it is thought that his legal responsibility is substantially the same. *The penalty for knowingly permitting a violation of the law is not less than for knowingly violating it.*"

So far as Andrews is concerned, general negligence is not once mentioned in the decision of the lower Court.

The Court discusses to some extent the failure of appellant Bowerman to attend the meetings of the Board of Directors, but if he was not a director, as is alleged in his answer, after the 1st day of July, 1910, it is immaterial, so far as this action is concerned whether he ever attended a meeting of the Board of Directors of the Bank. On page 39 of the record the Court says:

> "Did he (Bowerman) *with knowledge* remain silent and inactive when he should have spoken and made active opposition and *did he thus knowingly assent to or knowingly permit the loans to be made.*"

And again on page 39 of the record the trial Court, after discussing the evidence to the effect that these excess loans on which the Court of Appeals held that the

defendants were liable did not appear upon the discount and loan register required to be presented to the Board of Directors at their monthly meeting, and after saying that such a system of bookkeeping, if not designed to conceal, would in effect enable officers to make excess loans and to withhold knowledge from the Directors, unless they made an examination of the accounts of each individual depositor, says:

> "Doubtless, appreciating the strain at this point, counsel for the plaintiff sought to show such a course of business in allowing excess loans as to give rise to the inference that all the Directors *must have had knowledge thereof and assented thereto.*"

And in finally dismissing the Bill as to appellant Bowerman, the Court, on page 40 of the record, says:

> . "It cannot be said of him (Bowerman) that he knowingly permitted the loans to be made."

Clearly, if it had been urged in the lower Court that the defendants, and especially the appellant Bowerman, were liable to the Bank under the rules of the common law for negligence in administering the affairs of the Bank, Judge Dietrich would have in some manner passed upon this question. But nowhere in the whole decision is there any discussion in any manner of the liability of the defendants or any of them for general negligence, but the whole decision turns upon the question of a knowing violation or knowingly permitting a violation of the National Bank Act. It is incredible that Judge Dietrich would not in some manner have passed upon this question had it been urged in the lower Court.

Counsel for appellee opened his case by asking the following question (p. 48, record), in connection with the buying of the Langsdorf and Company bank:

> "Now please read, Mr. Biscoe, the loans so taken over which were in excess of $5,000.00 to any one individual, or firm, or company."

to which question objection was made by counsel for appellant Bowerman that they were not charged with taking over such excess loans, and Mr. Budge, counsel for appellee, on the same page says that the purpose of asking such question was

> "To show the date when the mismanagement commenced and as charging the *defendants with knowledge*, either actual or constructive, of the mismanagement of the Bank * * * and just simply for the purpose of showing that the Bank here was making *loans in excess of its statutory limit*, and thereby mismanaging the bank."

This clearly shows that counsel was relying upon a known violation, or knowingly permitting a violation of the National Bank Act, and the Court, after sustaining the objection to the question, says on page 49:

> "You understand that I do not sustain this objection upon the ground that you cannot introduce evidence of similar acts to those charged, *for the purpose of showing intent and knowledge*, but I do not conceive that the taking over of the assets of this bank would involve transactions of a similar nature. I see nothing wrong in taking over the assets of this Company, even though those assets may have involved loans in excess of $5,000.00."

From an examination of pages 48, 49 and 50 it is clear that both consel for the Receiver and the Court were assuming that the action was one for violation of the National Bank Act. On page 49 counsel for the Receiver introduced in evidence a letter from the Comptroller of the Currency to the First National Bank of Salmon showing that these loans taken over from Langsdorf and Company were excess loans and finally, on page 50 of the record, a number of loans which were in excess of the amount permitted by law were read into the record, and, as stated by counsel for plaintiff, the purpose of this was to show that defendants had either actual or constructive

knowledge of the violation of the National Bank Act. Again, on pages 60 and 61, it is clear from reading the remarks of counsel for the Receiver, and the testimony of the witness, that counsel was relying upon a violation of the statute by making excessinge loans. On page 72 of the record counsel asked leave to amend his Bill to show that a loan of $6,250.00 was an excess loan, and at the close of appellee's case appellant Bowerman, through his counsel, made a motion to dismiss the Bill as against him in the following words (p. 83, record):

> "I move to dismiss the Bill as to the defendant Bowerman because they have not in anywise brought him within the terms of Section 5239 of the Revised Statutes of the United States as interpreted by the Courts of the United States. I can present it very briefly."

This motion to dismiss is very much qualified, clearly showing that counsel for Bowerman had assumed that the case had been tried on the theory that Bowerman had knowingly permitted a violation of the National Bank Act. The Court makes no comment of any kind on this motion, neither does counsel for Receiver. It is inconceivable that had the action been tried on any other theory than on a theory of a violation of the Act, that both the Court and counsel would have in no manner commented upon the qualification of the motion, and the Court, on page 40 of the record, in dismissing the Bill as to Bowerman, says:

> "But upon the whole, I am unable to conclude that he was grossly negligent, or that he had such information that it can be said of him that he *knowingly permitted* the loans to be made."

If counsel for appellee had been relying upon a violation of the common law duty, surely the Court would in some manner have discussed this question as to appellant Bowerman, rather than discussing the question as to

whether the evidence was sufficient to show that Bowerman had knowingly permitted the statute to be violated.

There are many other instances in the record which tend to show that the action was tried on the theory of a knowing violation of the statute, or knowingly permitting the National Bank Act to be violated so far as appellant Bowerman is concerned, and standing alone there may be some evidence which would tend to support a theory that the case had been tried as for liability by reason of general negligence, but when the whole record is considered, the only conclusion that can be drawn therefrom is the one that the action was tried in the lower Court on the theory that Bowerman had knowingly permitted the National Bank Act to be violated.

In Lesser Cotton Co. v. St. Louis, etc., Ry. Co., 114 Fed. 133, 52 C. C. A. 95, and on pages 142 and 143 the Court states:

> "One may not try a case upon one theory and then reverse the judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged or tried in the Court below." (Citing cases.)

In Lutcher & Moore Lbr. Co. v. Knight, 217 U. S. 257, 54 L. Ed. 757, this Court announced the same rule. There the case had been tried before a jury by counsel for both sides and by the trial court on the basis of a law action. When the case came before the Circuit Court of Appeals the judgment was affirmed, the court holding that the matters of defense relied upon at the trial were of an equitable nature, not cognizable in a court of law, and therefore judgment for plaintiff was proper. A petition for rehearing was filed, showing, as was done by Bowerman in this case, that the defendant had not had an opportunity to present his case; but this petition was denied and the case came to this Court on writ of error. In reversing the lower Court this Court used the following language:

"The decision of the question before us is controlled by the case of Burbank v. Bigelow, 154 U. S. 558, Appx., and 19 L. ed. 51. 14 Sup. Ct. Rep. 1163. That was an action at law in which the plaintiff recovered judgment. In this court, for the first time, the objection was made by the unsuccessful party that the matter of the demand of plaintiff was one of equitable cognizance. The Court, however, said (p. 559):

" 'The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal Courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court.'

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the Circuit Court of Appeals was substantially to deny to the plaintiffs in error in that Court, petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." (Our italics.)

In the case at bar, as in the case just quoted from, the action of the Circuit Court of Appeals denies appellant his day in court and condemns him without any opportunity to be heard. Upon the theory upon which the case was tried in the trial court, appellant was content to rest his case, but when that theory is changed he certainly should be given an opportunity to present evidence in support of the denials and affirmative allegations in his answer.

We feel that we are sustained in this contention by the ruling of the court in the case of M. K. & T. Ry. Co., v. Wilhoit, 87 C. C. A. 401, 160 Fed. 440, where Mr. Justice Van Devanter used the following language:

> "We must, therefore, give effect to the settled rule that where parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, they will not be permitted to depart therefrom when the case is brought before the Appellate Court for review."

As the complaint was dismissed as to Bowerman on the motion made at the close of the testimony of appellee (trans. pp. 83, 40), and on a reversal of the decision of the trial court the Court of Appeals should have directed that a new trial be given Bowerman, instead of simply directing the entry of a judgment against him, and thereby depriving him of an opportunity to be heard on the allegations of his answer, which raised issues under the pleadings as to whether or not Bowerman was a director at the time these loans were made, for clearly if he is to be held on a common law liability he should be given an opportunity to make proof on this issue.

This contention would seem to be sustained in principle in the case of Saunders v. Shaw, 244 U. S. 317, 61 L. ed. 1163, 1165, where the Supreme Court of Louisiana on rehearing reversed the previous opinion and directed judgment to be entered against a party without giving him an opportunity to present his evidence. This Court held that, regardless of whether or not judgment should have been entered against the party as a matter of law, he was denied due process of law by the action of the Supreme Court in depriving him of an opportunity to be heard.

Bowerman should not be held liable for interest on the excessive loans.

But if the Circuit Court of Appeals properly directed the entry of judgment against Bowerman it certainly erred in holding him liable for interest on the loans alleged to have been made negligently, improvidently and in excess of the statutory limitation. While the Court

did not definitely and finally determine the precise amounts due, it appears from the transcript at page 105 (f. 211) that this interest (at the rate stated in the notes) amounted to over $14,000 at the date of the trial, and since that time over $7,000.00, thus making a total amount due for interest which is only slightly less than the total losses as found by the Circuit Court of Appeals. On this question of interest that Court said (Trans, p. 111):

> "The court disallowed all interest prior to the entry of the decree. In this respect we are also in disagreement with the decree, for we think that interest should have been included, to be calculated from the respective dates of the notes given by the Salmon Lumber Company, the Pollards and Brown, respectively."

We can find no authority whatever for the allowance of this interest. The liability alleged to exist is for negligence. and the demand is still unliquidated, for the mandate contains a direction for the ascertainment of the amount due. The rule is laid down in Sutherland on Damages, Vol. 2, Sec. 347, thus:

> "It is a general principle that interest is not allowed on unliquidated damages or demands. * * * Interest is denied when the demand is unliquidated, for the reason that the person liable does not know what sum he owed, and therefore can not be in default for not paying."

The author goes on to show that certain exceptions to this rule have been allowed, as where property or money has been converted, or misappropriated. There the wrongdoer may be held, but obviously these exceptions cannot apply in this case, because Bowerman never had any money belonging to the Bank, never participated in any of the transactions in question, and it is obvious from the record that he has profited nothing by his connection with the Bank.

This Court, in United States v. North Carolina, 136 U. S. 211, 34 L. Ed. 336, lays down the rule clearly as follows:

> "Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled."

In Dresser v. Bates, 250 Fed. 525, 552, the Circuit Court of Appeals for the First Circuit, considered the question of interest in an action against National Bank Directors, and declined to award it, and in so doing made the following very pertinent observations (pp. 553, 544):

> "Where the right of interest is not established by contract, by statute, or by judgment, it ordinarily comes as an allowance in the nature of damages, based upon use or wrongful detention. Pike v. Gregory, 118 Fed. 128, 129, 55 C. C. A. 78; United States v. North Carolina, 136 U. S. 211, 216, 10 Sup. Ct. 920, 34 L. Ed. 336.
>
> "On the whole, and under the circumstances of this case, we incline to the view that there are no sufficient equitable reasons for allowing interest upon the unliquidated damages which resulted from losses, the amount of which is to be hereafter ascertained, in order that the measure of the plaintiff's right of recovery may be known and established by a modified decree to be hereafter formulated by the District Court.
>
> "Where damages are unliquidated there is usually no interest until the right to the principal is established or, in other words, until judgment or decree."
>
> See also Pike v. Gregory, 118 Fed. 128, 55 C. C. A. 78.

The case of Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 442, from the Eighth Circuit, illustrates the proper allowance of interest. There the directors and officers of a National Bank had misappropriated its funds and were properly held for interest, the court saying:

> "When money has been misappropriated and converted to his own use by a defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds."

But here no money of the Bank was converted or used by any of the defendants, and certainly not by Bowerman.

The learned trial Court, in passing on the question of the liability of the defendant King, who was President and Chief Executive officer of the Bank, said (trans. p. 35, f. 64):

> "While I have found the conduct of the defendant wrongful, it was not of a flagrant character. I am inclined to think that he continued to extend credit after the limit was reached, with the hope of protecting the existing loan, and while this consideration does not excuse, it tends to extenuate the fault. He received no benefit from the use of the money. No interest will therefore be allowed. Eastfield v. McKeon, 208 Fed. 580. Stephens v. Phenix Bridge Co., 139 Fed. 248. Union Steamboat Co. v. Chaffin, 204 Fed. 412. White v. United States, 202 Fed. 501. La Conner, etc. v. Widmer, 136 Fed. 177. Redfield v. Ystalyfera Iron Co., 110 U. S. 174."

What the Court here says of defendant King is all the more true of Bowerman, who lived 200 miles from Salmon, and whose alleged liability in this action is based solely on the fact that he took no part in the conduct of the affairs of the Bank. He certainly received no benefit from the use of this money by the borrowers, and his liability, if any can be found, must be based solely on a failure to exercise the care and diligence which the situation demanded.

This brings us back, therefore, to the proposition that in an action for negligence pure and simple, where no money has been misappropriated or converted by a defendent, he cannot be held for interest. This is all the

more true in the present case, where the trial Court, in the exercise of its discretion in an equity case, found that the defendants against whom it entered judgment were not liable for interest. Certainly the Circuit Court of Appeals could not say that such finding was an abuse of discretion, and in decreeing that the defendants were liable to pay interest it seems to have lost sight of the rule that a reasonable discretion is given the trial Court in such cases, and that this discretion will not be reversed in the absence of a very strong showing.

In conclusion, we submit that the decision of the Circuit Court of Appeals should be reversed. It erred in holding that the statutory liability of directors of National Banks under Section 5239 is exclusive only when the loss has resulted *solely* from a violation of a duty expressly imposed upon them by the National Bank Act; it erred in denying to Bowerman the immunity and protection extended to directors by that Act; it erred in directing that judgment be entered against Bowerman for common law negligence and on an issue and theory upon which he had not been tried in the trial court; it erred in directing that the judgment against him should be for the full amount of the loans and in not limiting his liability in any event to the losses resulting from the loans made in excess of the statutory limit; and it erred in directing that he should be held for the full amount of the interest accruing on the full amount of the loans and according to the rates specified in the notes.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 289

GUY E. BOWERMAN, *Appellant,*

vs.

C. D. HAMNER, as Receiver of the First National Bank of Salmon, *Appellee.*

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF APPELLEE

BRIEF OF ARGUMENT.

Appellee will confine himself to a discussion of the three following questions raised by the appellant:

1. The question of the right to interest upon the judgment found against the appellant.
2. The question of the change of theory of the case upon appeal, and judgment.
3. The question as to whether there is a common-law liability of Directors of National Banks, or is Section 5239 of the National Banking Act exclusive.

ARGUMENT.

We wish to point out that this is a bill in equity instituted by the appellee to have an accounting and to

have the losses assessed against the directors; the statutes so far as material are set out in the transcript P. 104.

1. *The question of the right to interest upon the judgment found against the appellant.*

We understand the general rule as to the right to interest in equity cases to be as stated in Dresser vs. Bates, 250 Fed. at page 552, wherein the court says.

> "It is probably quite correct to say, especially in equity cases, that it is reasonably within the realm of discretion—in cases where the recovery relates to unliquidated damages and to situations where recovery is not for money misappropriated and used by the defendant, but where he is sought to be charged upon the ground of negligence or the wrongdoing of another, and where the appeal is not for delay, but prosecuted in good faith upon substantial and close lines of controversy in respect to liability—for the court to say, if it finds equitable grounds for saying it, that interest ought to follow, or that it ought not to follow, and this without regard to whether the decree is affirmed in whole or in part. Steel Co. v. New York City R. R., 198 Fed. 778, 779, 780, 117 C. C. A. 560; Tire Co. v. Rubber Co. (D. C.) 232, Fed. 508; De La Rama v. De La Rama, 241 U. S. 154, 159, 36 Sup. Ct. 518, 60 L. Ed. 932, Ann. Cas 1917C, 411."

The Circuit Court of Appeals in this case, having determined that the damages became liquidated as of the time the notes were given to the bank (Tran P. 111), *we think its opinion was correct, for it is the general rule that interest will be allowed from the time the damages, if any, become liquidated. Appellant seems to be contending for the rule applicable to action in law for damages.*

II.

The question of the change of theory of the case upon appeal, and judgment.

Appellant vehemently contends that appellee sought to change his theory of the case upon appeal from that upon which it was tried, and we in turn insist that it is appellant himself who is seeking to change the theory of the case in order that he may retract his election to stand upon his motion to dismiss. (Trans. P. 83 and 98.) In 3 C. J. page 727, Section 623, the following is laid down:

> "The general rule is that the appellate court will consider only such issues as were both raised and relied upon in the lower court. But, where a case has been tried without objection as though the pleadings raised a certain issue, the objection that the issue was not raised by the pleadings or that the issues were not complete cannot be made for the first time in the appellate court, and especially is this true where the pleadings, by a reasonable interpretation or fair construction, can be held to present and raise the issue....and certainly an objection that an allegation is not sufficiently specific to raise an issue which was tried in the court below cannot be made for the first time in the appellate court."

See authorities therein cited.

Williams vs. Brady, 221 Fed. 118;
Hindman vs. Oregon Short Line R. Co. 178 Pac. 837 (Idaho).

We do not understand why counsel says that the trial judge did not discuss negligence when so much space of the trial judge's opinion is devoted to the conduct of the appellant, Bowerman (Trans. P. 36 to 40 Inc.) and it seems to us that the excerpts quoted by appellant in his brief (pages 20 to 26) are decisive

against appellant's contention that appellee sought to change his theory of the case. Appellant first suggested the contention of a change of the theory on his petition for a rehearing to the Circuit Court of Appeals and it was denied. We cannot but think, as intimated hereinbefore, that appellant is seeking to retract his election evidenced by his motion to dismiss and if we are correct in this contention, then it follows that appellant's objection to the ordering of final judgment by the Circuit Court of Appeals is without validity for the reason that this is a case in equity and the trial court heard all the facts and all the parties were before the court and the damages were ascertained. The authorities seem uniform under these circumstances in holding that an appellate court may direct final judgment.

Rathbone vs. Board of Com'rs. 83 Fed. 125 at page 132;

Certiorari denied, 170 U. S. 705;

This court in the case of City and County of Denver et al. vs. Denver Union Water Company, 246 U. S. 187; 38 Sup. Ct. 278, speaking through Mr. Justice Pitney said:

> "The issues were fully heard before the master, all proffered evidence was admitted, the exceptions taken to his findings raised no serious questions of fact, we have before us in the record the evidence and all other materials necessary for judgment, and will simply proceed to do what the District Court ought to have done, namely, consider the report and pass upon the exceptions and make such decree as is equitable in the premises."

Central Improvement Co. v. Cambria Steel Co., 210 Fed., 696.

Parker Washington Co. v. Cramer, 201 Fed. 878.

Churchill v. Buck, 102 Fed. 38.

III. *The question as to whether there is a common-law liability of directors of National Banks, or is Section 5239 of the National Banking Act exclusive.*

We believe the controlling question in this case to be whether this court believes the negligence established on the part of the appellant is sufficient to warrant holding him as a matter of law liable for the losses. It seems as though the difficulty experienced by the courts consists principally in a diversity of views as to what conduct must be shown to constitute negligence rather than any uncertainty as to the rule of law holding directors of national banks liable for a breach of their common-law duties.

Dresser vs. Bates, 250 Fed. 525.
Bates vs. Dresser, 229 Fed. 772.

A careful reading of the cases involving the question of liability of directors of national banks for a breach of their common-law duties shows that the question raised by appellant has been unsuccessfully contended for heretofore. In the case of Williams vs. Brady, 232 Fed. 740, District Judge Haight, at page 741, comments as follows:

> "It is now urged, apparently for the first time, that the defendants are liable only by virtue of Section 5239 of the Revised Statutes (Comp. St. 1913 Par. 9831); in other words, that there is no common-law liability of a director of a national bank, and that consequently all portions of the bill which seek to charge the defendants with liability for acts or omissions which are not specific violations of the provisions of the statutes relating to national banks, must be stricken out. This question is probably covered by Judge Hunt's ruling, because the original bill contained many aver-

ments of dereliction of duty which were not violations of such statutes. However, as it does not appear to have been specifically presented to or decided by him, I will consider it. The proposition seems to be based upon counsel's conception of what was held and said by the Supreme Court in Yates vs. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. I cannot gather anything from the opinion in that case which would warrant such a construction, but on the other hand, it appears to me very clear that the court recognized that there is a liability on the part of national bank directors for failure to perform the duty which the general principles of the law cast upon them when they become directors, distinct from and in addition to the duties and liabilities imposed by the statutes. It was said by Chief Justice White (206 U. S. 178, 27 Sup. Ct. 645, 51 L. Ed. 1002):

"In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements.

"That case simply decided that the National Bank Act (Act June 3, 1864, c. 106, 13 Stat. 99) imposes upon directors of national banks duties which did not rest upon them at common law, and that section 5239 affords the exclusive rule by which to measure the right to recover damages, based upon a loss resulting solely from the violation of such duties. The same question as is here presented was raised in Allen vs. Luke, 163 Fed. 1018 (C C Mass.), and was decided adversely to defendants' contention; Judge Lowell entertaining the same view of Yates vs. Jones National as is here expressed. That there exists a liability on the part of national bank directors for failure to perform the duty imposed upon them by the general principles of the law, irrespective of the

statute, is, I think, also clear from Briggs vs. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, where the measure of such duty is defined. See, also, Rankin v. Cooper, 149 Fed. 1010 (C. C. W. D. Ark.)."

In the same case on an earlier hearing, 221 Fed. 118, Circuit Judge Hunt, at page 121, sets out this question as follows:

"Accepting the rule enunciated by the Supreme Court in Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, and Thomas v. Taylor, 224 U. S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673, it is enough to say for the purposes of the present motion that directors of national banks must exercise ordinary care and prudence in the administration of the affairs of their institutions. They are required, however, to do more than be mere figureheads, and may reasonably be expected to exercise reasonable supervision, and they are not to be permitted to be shielded from liability because of want of knowledge or wrongdoing, if that ignorance is the result of gross inattention. These general principles harmonize with the forcible expressions of Vice Chancellor Pitney in Campbell v. Watson, 62 N. J. Eq. 396, 50 Atl. 120, and are in line with Chancellor McGill's views in his very able opinion in Williams vs. McKay, 46 N. J. Eq. 25, 18 Atl. 824. In Rankin v. Cooper (C. C.) 149 Fed. 1010, Judge Finkelnburg made a clear summary of the relationship of directors of national banks. I quote as follows:

"'(1). Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs.

" '(2). They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors.

" '(3). Ordinary care, in this matter, as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances.

" '(4). The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances.

" '(5). If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them.

" '(6). Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank.

" '(7). It is incumbent upon bank directors in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency.' "

Also the following appears in the case of Allen vs. Luke, 163 Fed. 1018, at page 1020, on hearing of demurrer:

> "Fifth. As to B that the statutory liability is exclusive, and that neither at common-law nor in equity does any liability rest upon the directors for the result of their negligence. For this proposition the defendants rely chiefly upon Yates v. Jones National Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002; but that case is decisive against the defendants. "Mark the contrast between the general common-law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.' " 206 U. S. 178, 27 Sup. Ct. 645 (51 L. Ed. 1002).

7 C. J. 788 and 789.

The learned and forcible expressions of Vice Chancellor Pitney in Campbell vs. Watson, 62 N. J. Eq. 396, 50 Atl. 120 are in consonance with the above expressions of the Federal Courts from which decision we quote as follows:

> "At the outset, I make some preliminary observations: First. The language on this topic of judges, as reported in the books, must, in all cases,

be construed in the light of the facts of the particular case. Second. The various directions in which the care of directors of banking institutions should be exercised in order to protect against fraud and theft of employes has greatly increased in number and variety within 50 years. Experience has developed modes of theft by such employees unknown and unthought of half a century ago, and these manifestations of ingenuity on the part of the thieves has been met by new safeguards on the part of the directors; so that what years ago would have been considered due diligence cannot be so considered today. Third. So numerous have been the defalcations and dishonest abstractions of money by employes of high grade, who had by years of right living and acting earned the confidence of their employers, that it has become well nigh a maxim with such institutions, to, so to speak, trust nobody beyond what is necessary to the practical business of the bank, and to subject the work of each one from the highest to the lowest, to periodical investigation. Fourth. That at one time and in some instances bank directors were unpaid servants, who were not expected to spend much time or to give much attention to the affairs of the institution, and on that account were dealt with leniently by the courts; but at this day such officers are not expected to work gratuitously, and are usually paid a fair compensation; and, whether paid or not, they are entitled to no indulgence on that account. Their names give credit and standing to the institution, and are a guaranty to dealers that its affairs will be conducted with reasonable prudence and care, and according to law. They are, in my opinion, bound to acquaint themselves with the extent and mode of supervision exercised by officers of well-conducted banking institutions in the neighborhood. I cannot yield to the suggestion of some of the defendants'

counsel that the fact that the institution in question was a small country bank relieves its directors from adopting the same practical measures for its protection against frauds and thefts as were in use by its greater neighbors in the larger towns. Fifth. Another observation is that the directors cannot be held liable for a mistake in an honest judgment upon matters properly mere matters of judgment, as distinguished from matters of administration. In matters of administration, where a duty to perform certain functions devolves upon them they are justly held liable either for their non-performance, nonfeasance, or for their lack of ordinary diligence in their attempted performance, whereby loss is incurred. By 'ordinary diligence' I mean such as is exercised by other prudent and diligent officers under like circumstances. What degree of diligence is reasonable in the concrete will be considered in connection with the specific acts of negligence upon which the complainant relies."

In Warren vs. Robinson (Utah) 57 Pac. 290, the court approvingly quotes the following declaration of Lord Chancellor Hardwicke:

> "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. * * * Therefore, committeemen are most properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of acts of commission or omission, of malfeasance or non-feasance."

Referring to malfeasance or non-feasance, the chancellor said:

> "To instance, in non-attendance: If some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be

guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees."

In Marshall vs. Farmers' etc., Savings Bank; 85 Va., 676; 17 Am. St. Reports, 84, it is held:

"Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectable from want of proper security, or from not being properly protected, or enforced by appropriate proceedings. The fact that any particular director did not know of these wrongdoings will not exonerate him, because he could not be without such knowledge, except from his own negligence."

The Supreme Court of Illinois in Holmes vs. McDonald, 80 N. E. 714 lays down the following with respect to directors:

"In accepting such a position, the trustee or director undertakes that he possesses and will exercise at least the ordinary knowledge, skill and judgment requisite to the discharge of his duties and that he will be liable for gross negligence."

Morse on Banks and Banking, 5th Edition, Section 128, at Page 268, says:

"If the directors do not use ordinary diligence to know the conduct of officers and what the bank

books show, and to control their subordinates, and loss results, they are liable. The degree of care required of directors depends upon the subject to which it is to be applied and each case is to be determined in view of all the circumstances."

Ellis v. First National Bank, 22 R. I. 565, 48 Atl. 936.
Wilkinson v. Dodd, (N. J.) 7 Atl. 327.
New York and New Haven R. R. Co. vs. Schuyler, 34 N. Y. 30.
Martin vs. Webb, 110 U. S. 15, 28 L. Ed. 49.
Williams vs. McKay, (N. J.) 18 Atl. 824.
Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932;
Banks vs. Bossieux, 3 Fed. 817.

The late cases of this court specifically hold that the rule expressed in Section 5239 is exclusive and precludes common-law liability for fraud and deceit.

Chesbrough vs. Woodworth, 244 U. S. 72;
Thomas vs. Taylor, 224 U. S. 73.

However, Yates vs. Jones National Bank, 206 U. S. 158 simply held that Section 5239 was supplementary to the common-law and imposed specific duties in addition to the common-law. The cases heretofore decided by this court, beginning with the Yates case, sound in deceit and do not attempt to cover common-law negligence. The statute enjoins the duties and prescribes the penalties for violation thereof and it is the exclusive measures of the damages; but in this case we have not under discussion violations of the statute nor action for fraud or deceit but the failure to perform any act of commission of a director either statutory or at common law. Appellant's contention (brief P. 16) that there can be a common-law liability only where there is no violation of an express provision of the statute is far fetched in his attempt to link his appeal

with the conduct of the other directors. The appellant performed no affirmative duty, either statutory or common-law and so we fail to see how he can seek the protection of the statute for the facts show he did not knowingly participate in any act complained of; but deliberately failed to do anything. Consequently the measure of his civil liability must be under the common law for he never reached the stage of acts of commission such as complained of on the part of the other directors.

In light of these principles let us consider briefly the conduct of appellant as director in relation to the principles. It appears that Mr. Bowerman was a business man of considerable experience and acquainted with the banking business during the times he was a director of the First National Bank at Salmon (Trans. P. 74 to 78 Inc.) and it further appears that Mr. Bowerman, during all the times he acted as director, was a resident of St. Anthony, Idaho (Trans. P. 74) and that "Mr. Bowerman was never present at any meeting of stockholders or directors, special or regular" (Trans. P. 73) and it also further appears that Mr. Bowerman, beginning as early as the closing of the deal purchasing the Langsdorf interests by the First National Bank, knew something of the conditions of the bank, and that in July, 1910, he began writing to the executive officers of the bank with respect to transactions then pending (Trans. P. 75) and it was found that "it further appears that he never attended a meeting of the Board of Directors nor were notices of meeting sent to him" (Trans. P. 36) and that "he did nothing whatever in connection with the bank or its affairs" (Trans P. 107).

In this case we are relieved of discussing the excuses or extenuating circumstances because the appellant, Mr. Bowerman, never did anything in fulfillment of his duties statutory or common-law. If he had attended meetings of the Board but had done nothing to keep himself informed of the conduct of King and Lottridge, his negligence would have rendered him liable, then it follows, of course, he is guilty of still greater negligence in never attending meetings of the board. We think the Circuit Court of Appeals correctly expressed the manner in which we should approach the examination of the conduct of Mr. Bowerman when it said (Trans. P. 111):

> "If the evidence showed any effort or attention on the part of Mr. Bowerman, his appeal might find some foundation of merit, but as we scrutinize his course, it cannot be squared with any standard of ordinary care or reasonable diligence."

We disagree with the trial court when it says, (Trans. P. 38):

> "Now in the light of these principles, it becomes manifest that the defendant's non-residence is one of the material circumstances that must be considered in determining whether or not he was negligent."

and believe that the Circuit Court of Appeals' opinion (Trans. P. 110) is more consonant with the authorities and the experience of today, when it says:

> "The fact that Mr. Bowerman lived 200 miles away is not an excuse for him. He lived that distance from Salmon when he voluntarily accepted the directorship, and to exonerate him from neglecting to attend meetings of the board or inquiring into the conduct of the institution would

be practically to hold that there was no meaning and significance whatever to the oath he took that he would, so far as the duty devolved upon him, earnestly and diligently administer the affairs of the association."

and in Rankin vs. Cooper, 149 Fed. 1010, it is said:

"It is also urged in defense of Col. Roots that he was necessarily absent from Little Rock a great deal, and hence unable to attend many board meetings. The same defense is made on behalf of defendant Blass, who spent much of his time in trips to the east in connection with his mercantile business. But to permit this to operate as a defense in a case of this kind would be putting a premium on the failure to attend board meetings and a penalty on those who attend regularly."

We cannot better close this line of the discussion than by quoting from the Circuit Court of Appeals' opinion (Trans. P. 111) wherein it adopts the statement of Judge Severens in Gibbons vs. Anderson, 80 Fed. 345:

"What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors whose names so often stand at the head of its business cards and advertisements, and who are always used as makeweights in its solicitation for business, would only select a cashier, and surrender the management to him? It is safe to say that such an insti-

tution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests would be committed to one man, without oversight and control."

Respectfully submitted,

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BOWERMAN *v.* HAMNER, AS RECEIVER OF THE FIRST NATIONAL BANK OF SALMON.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 289. Argued April 28, 29, 1919.—Decided June 9, 1919.

In addition to the specific duties defined in the National Banking Law, a director of a national bank is under a common-law obligation, to depositors and shareholders as well as to borrowers, to exercise at least ordinary care and prudence in the supervision and administration of the bank's affairs. P. 510.

While knowledge may be essential to render a director liable as for a breach of a duty specially imposed by the statute, this does not prevent application of the common-law rule in measuring violations of common-law duties. P. 511.

Both kinds of liability may be asserted in one bill of complaint. *Id.*

A director of a national bank who wilfully fails to attend the meetings

of the board of directors and otherwise to inform himself of the condition of the bank and to supervise its affairs is guilty of a breach of his common-law obligation, and liable for losses resulting from gross mismanagement by the executive officers which a proper attention to his duties might have avoided. P. 513.

The fact that the director resides at a distance from the location of the bank does not excuse him from this responsibility. P. 514.

Where a director of a national bank, charged in the same bill with both statutory and common-law liability, secured a dismissal of the bill on the plaintiff's proofs without introducing any evidence of his own, and the Circuit Court of Appeals reversed the case and directed a decree against him on the ground that the common-law liability was established, *held*, that the defendant was not entitled to a new trial of that issue upon the ground that the case in the District Court had been treated as involving only the statutory liability. *Id.*

Under Rev. Stats., § 5145, a director of a national bank remains responsible as such in the absence of evidence that he has resigned or refused to qualify when reëlected. *Id.*

241 Fed. Rep. 737, affirmed.

THE case is stated in the opinion.

Mr. Oliver O. Haga, with whom *Mr. James H. Richards*, *Mr. McKeen F. Morrow* and *Mr. J. L. Eberle* were on the brief, for appellant.

Mr. J. M. Stevens, with whom *Mr. Milton C. Elliott*, *Mr. Jesse R. S. Budge* and *Mr. H. E. Ray* were on the brief, for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit, commenced in the United States District Court for the District of Idaho, Eastern Division, by the Receiver of the First National Bank of Salmon, against the former executive officers and directors of the bank to obtain an accounting and decree for money lost by the alleged unlawful and negligent management of the affairs of the bank.

The sole appellant, Bowerman, was a director, but not an executive officer, of the bank from its organization in January, 1906, until its failure in August, 1911, and, as owner of $10,000 of the capital stock, he was the largest stockholder but one.

The bank was located in a small town in Idaho. It had a capital stock of only $25,000, which was increased, in February, 1910, to $50,000, and it had a book surplus of $15,000,—$5,000 of which was improperly carried to the surplus account in July, 1910, when the capital was certainly impaired.

When the plaintiff rested, the appellant moved that the bill be dismissed as to him, announcing that he would not introduce any evidence in his own behalf, and at the conclusion of the trial the District Court granted his motion. On appeal the Circuit Court of Appeals reversed this judgment, found Bowerman liable, and in the decree, which we are reviewing, remanded the case to the District Court with direction to enter a decree in conformity with the views expressed in its opinion.

The amended bill, on which the case was tried, is framed in fact, though not in form, in the alternative, averring, first, that the executive officers made and that the directors knowingly permitted them to make, three designated loans, each in excess of one-tenth part of the paid in and unimpaired capital stock and surplus of the bank, in violation of § 5200 of the Revised Statutes of the United States. It then proceeds to allege: that, beginning with January, 1910, the affairs of the bank were grossly mismanaged by the executive officers, with the negligent permission of appellant and other directors; that of the three designated loans, on which large losses were sustained, the first was made to the Salmon Lumber Company, a corporation without financial resources to justify such a loan without security, and with its capital stock owned principally by members of the family of the president of the

bank; that the two other designated loans were negligently made to persons without financial standing and without security sufficient to justify the making of them; that overdrafts aggregating large amounts were permitted to be made by many persons, in violation of the by-laws of the association, and that a dividend on the capital stock was declared and paid in July, 1910, when the capital stock and surplus of the bank had been much impaired and its assets greatly depreciated. This gross mismanagement, it is averred, caused the failure of the bank and the loss for which recovery is prayed.

With respect to appellant Bowerman, it is specifically alleged that in disregard of his oath as a director to diligently and honestly administer the affairs of the bank, he negligently and wilfully failed: to attend a single meeting of the board of directors, to at any time examine, or cause to be examined, the books and papers of the bank to ascertain its condition, or to in any manner inform himself as to the loans and overdrafts that were being made during the long period of mismanagement by the executive officers. It is alleged that the exercise by him as a director of a proper supervision of the affairs of the bank would have prevented the mismanagement complained of and the loss which resulted from it.

Appellant's answer to the bill is substantially a general denial.

The evidence applicable to the allegations against Bowerman may be summarized as follows:

He was a director during the entire five and one-half years of the existence of the bank, but never attended a single directors' meeting, regular or special. The only justification or excuse he offers for such conduct is that he lived about 200 miles from the town in which the bank was located and that communication between the two places was difficult.

In a letter, which is in evidence, written by him to the

president of the bank in 1911, after the failure, he refers to himself as "a nominal director," and says that prompted by a published statement of the bank, which he had seen in 1910, he began writing to the president, warning him of the consequences if the "very hazardous manner of conducting the bank" was not changed, "various matters corrected and improved and more of the notes collected, and the reserve kept up." In this letter he says that he had never been "consulted, either as to the management of the bank, its business transactions or its policy," and that he had never received a statement of its condition, either the usual published statement or one for his personal use, without making request for it, and that in some cases he had been obliged to write several times before one was sent to him. The record, however, does not show that any communication of the kind described in this letter was ever written by him prior to the failure.

The only certified copies in evidence of the oath taken by Bowerman as a director are for the years beginning in January, 1909, and in January, 1910. They are in the form prescribed by statute, that the affiant will "diligently and honestly administer the affairs of said association, and will not knowingly violate, or willingly permit to be violated, any of the provisions" of the statutes of the United States under which the association was organized.

The by-laws of the bank are in evidence and they require "that regular meetings of the directors shall be held on the first Tuesday of each month;" that a "loans committee," to be composed of the president, cashier and one director, shall make a report to each meeting of the board of directors of all bills, notes, and other evidences of debt discounted and purchased since its last previous report; that no officer or clerk shall pay any check drawn upon the bank unless the drawer at the time of its presentation had sufficient funds on deposit to meet it; that a committee of three directors shall examine the affairs of the bank

every month to see whether it is in sound and solvent condition and to recommend changes which may seem desirable in the manner of doing business.

In addition to these, there was a special by-law adopted on January 18, 1910, upon the suggestion of the Comptroller of the Treasury, requiring that "the Board of Directors of the bank shall, at each monthly meeting, or oftener, examine and approve all loans and discounts, and such approval shall be recorded in a book kept for that purpose."

Some of these by-laws were flagrantly disobeyed for years before the failure, and the others were observed in a manner so perfunctory as to amount to a disobedience of them. The three large loans complained of were never reported to the board of directors, except fragmentarily from time to time when indistinguishably incorporated with other overdrafts, although they were gradually accruing during many months.

When the bank failed its liabilities were $273,719.14 and its assets, nominally $325,624.12, from which, assuming that the stockholders' liability was not included in them, (as to which the record is not clear), there was realized about $220,000, thus showing a shrinkage of approximately $100,000 in the resources of a bank with a capital and surplus of $60,000.

The District Court, with the full record before it, found the aggregate of the three excessive loans at the time the bank failed to be $35,700. Each of these loans was made up by allowing unsecured overdrafts to accumulate over a considerable period of time and then permitting them to be converted into unsecured notes.

Without going more into the details, there can be no doubt that the business of the bank was surrendered wholly to the president and cashier, and was grossly mismanaged after January, 1910, in utter disregard of the national banking laws and of the by-laws of the association, and that this mismanagement was of such a charac-

ter that even slight care in the discharge of his duties as a director must have led Bowerman, an experienced banker, to discover the trend of the management and to have prevented the greater part, if not all, of the losses which resulted in the failure.

The appellant relies chiefly upon the assignment of error that there is no evidence in the record to show that he knowingly consented to the making of the three loans in excess of the limit imposed by Rev. Stats., § 5200, and therefore, he argues that under the rule prescribed in *Yates* v. *Jones National Bank*, 206 U. S. 158, and *Jones National Bank* v. *Yates*, 240 U. S. 541, the decree of the Circuit Court of Appeals holding him liable is erroneous and should be reversed.

While the cited cases hold that, in a suit for damages against national bank directors, based solely upon a violation of duty imposed by the national bank act, it is not enough to show a negligent violation of the act, but that something more, in effect an intentional violation, must be shown to justify a recovery, and that this is the exclusive rule for measuring the responsibility of directors as to such violations, yet, it is expressly pointed out in the opinion of the court, that the act does not relieve such directors from the common-law duty to be honest and diligent, as is shown by the oath which they are required to take to "diligently and honestly administer the affairs of such association" as well as not to "knowingly violate, or willingly permit to be violated, any of the provisions of this Title,"—the National Bank Act.

The rule thus announced would perhaps be applicable if the bill were limited to the charge of liability based solely upon the statutory prohibition of excessive loans, for it is reasonably clear that Bowerman did not have actual knowledge of the making of the loans or of anything else connected with the conduct of the bank. He deliberately avoided acquiring knowledge of its affairs and

wholly abdicated the duty of supervision and control which rested upon him as a director.

The National Bank Act imposes various specific duties on directors other than those imposed by the common law and it is obviously possible that a director may neglect one or more of the former and not any of the latter, or *vice versa*. For example, in this case we have the gross negligence of the appellant, in failing to discharge his common-law duty to diligently administer the affairs of the bank, made the basis for the contention that he did not "knowingly" violate his statutory duty by permitting the excessive loans to be made. While the statute furnishes the exclusive rule for determining whether its provisions have been violated or not, this does not prevent the application of the common-law rule for measuring violations of common-law duties. And there is no sound reason why a bill may be not so framed that, if the evidence fails to establish statutory negligence but establishes common-law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided.

The bill in this case is given, as we have seen, this broader scope, and contains the charge of statutory as well as common-law negligence on appellant's part, resulting in the loss complained of. Such pleading was accepted as proper practice in *Briggs* v. *Spaulding*, 141 U. S. 132, 142, 165, in which a bill thus "framed upon the theory of a breach by the defendants as directors 'of their common-law duties as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act,'" was under consideration by this court, and, upon a full review of the decisions, the rule for determining the common-law liability of directors of such banks was twice stated, once on p. 152:

"In any view the degree of care to which these defendants were bound is that which ordinarily prudent and

diligent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is, therefore, ultimately a question of fact, to be determined under all the circumstances."

And again, in the final summing up, on p. 165:

"Without reviewing the various decisions on the subject, we hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figure-heads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they to be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention."

In an earlier case, *Martin* v. *Webb*, 110 U. S. 7, 15, it was said:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

This latter statement of the rule is made in a case dealing only with borrowers from the bank, but there is no

good reason why it should not be applied for the protection of depositors and stockholders.

While the rule as thus formulated in *Briggs* v. *Spaulding, supra,* has been thought by some state courts of last resort to be an under-statement of the law of the duty of bank directors, it is amply broad, without re-statement, for the disposition of the case before us.

That ordinarily prudent and diligent men, accepting election to membership in a bank directorate, would not wilfully absent themselves from directors' meetings for years together as Bowerman did cannot be doubted; that a director who never makes, or causes to be made, any examination whatever of the books or papers of the bank to determine its condition and the way in which it is being conducted, does not exercise ordinary care and prudence in the management of the affairs of the bank is equally clear, and that Bowerman, when guilty of neglect in both of these respects, did not exercise the diligence which prudent men would usually exercise in ascertaining the condition of the business of the bank or a reasonable control and supervision over its affairs and officers is likewise beyond discussion. He cannot be shielded from liability because of want of knowledge of wrong-doing on his part, since that ignorance was the result of gross inattention in the discharge of his voluntarily assumed and sworn duty.

Bowerman was a banker, and the letter, from which we have quoted, written to the president of the bank which failed, shows he so understood the business of banking and what was necessary for the safe conduct of it that even slight care on his part in the discharge of his duty as a director must have discovered and arrested what he himself characterized as a hazardous manner of conducting its affairs. He was a man of such importance and reputation that the use of his name must have contributed to securing the confidence of the community and of

depositors for the bank, and it would be a reproach to the law to permit his residence at a distance from the location of the bank, a condition which existed from the time he first assumed the office of director, to serve as an excuse for his utter abdication of his common-law responsibility for the conduct of its affairs and for the flagrant violation of his oath of office when it resulted in loss to others.

It is argued that the decree of the Circuit Court of Appeals should be reversed and the cause remanded for a new trial for the reason that the trial in the District Court was on the theory that only the charge of statutory liability was involved and to be met by the appellant, and that he should have an opportunity to produce evidence, if he desires, on the issue of common-law liability.

At his peril the appellant put the construction on the pleadings which, for the reasons stated in this opinion, was erroneous. The suit was in equity and he was charged with notice that the decision of the trial court was subject to review on both the law and the facts and, although he was present in court during the trial, he neither took the stand to testify in his own behalf nor offered any evidence upon the question of his liability. The interests represented by the receiver are entitled to consideration as well as those of the appellant and the contention cannot be allowed.

It is also urged that the appellant resigned his office as director some time before the bank failed and that the decree of the Circuit Court of Appeals renders him liable for transactions after his resignation.

The only showing on this subject in the record is the averment in appellant's answer that he was not a director of the bank after about the first day of July, 1910, and that he refused to qualify when notified of his re-election in January, 1911. These allegations must be deemed denied under the 31st Equity Rule. The only evidence in

the record on the subject is the oath of office taken by appellant in January, 1910, and the testimony of the receiver that the letter from the appellant to the president of the bank, from which we have quoted, was the only letter from him which he found, among the papers which came into his possession as receiver, bearing on the mismanagement of the bank,—and that letter was written after the failure. Section 5145 of the Revised Statutes provides that directors shall hold office for one year and until their successors are elected and have qualified. In the absence of evidence that the appellant resigned or refused to qualify when re-elected in January, 1911, we must agree with the Circuit Court of Appeals in the conclusion reached, with the full record before it, that he continued to be a director "from the organization of the bank until the receiver took charge."

Other claims of error, chiefly technical, have been pressed upon our attention, and have all been considered and found to be without substantial merit. Conduct such as this appellant was so palpably guilty of is not to be weighed in the scales of an apothecary. The decree of the Circuit Court of Appeals must be

Affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE MCREYNOLDS dissent.